IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

Petitioners,

vs.

FIELDCREST DAIRIES, INC.,

Respondent.

BRIEF OF PETITIONERS.

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Opinions of the Courts Below.

The majority and dissenting opinions of the Circuit Court of Appeals (R. 1782-1796) are reported in 122 F. 2d. 132 (1941); the opinion of the District Court (R. 1752-1756) is reported in 35 F. Supp. 451 (1940).

Statement of Jurisdiction.

(a) The jurisdiction of this court is invoked under section 240 of the Judicial Code as amended by the act of

February 3, 1925 [28 U. S. C. 347, par. (a)]. The pertinent languange of the section is as follows:

> "(a) In any case . . . in a circuit court of appeals, . . . it shall be competent for the Supreme Court of the United States . . . to require by certiorari, *either before or after a judgment or decree by such lower court*, that the cause be certified to the Supreme Court for determination by it, and with like effect, as if the cause had been brought there by unrestricted appeal." (Italics added.)

In a sense the judgment of the Circuit Court of Appeals may not be a final judgment, since it reversed and remanded the cause for the purpose of modifying the decree entered by the trial court to conform with the views expressed in the opinion. But the Circuit Court of Appeals made a final determination that the ordinance involved is invalid and the formal modification of the decree is all that remains to be done in the trial court. This alone is enough to permit the Supreme Court to review the cause by writ of certiorari, particularly since the judgment need not be final in the technical sense. This is evident from the language of the section quoted above. And see *Fuller* v. *Otis Elevator Company*, 245 U. S. 489 (1917), where the fact that the judgment was not final was held to be no objection to the granting of the writ.

(b) The judgment of the Circuit Court of Appeals was entered on August 4, 1941 (R. 1797).

Statement of the Case.

The case involves a provision in the milk ordinance of the City of Chicago requiring milk to be delivered in "standard milk bottles."* The Circuit Court of Appeals

* The provision is contained in the third sentence of section 3094 of the ordinance: "Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles; . . ." (R. 108).

for the Seventh Circuit has held that this provision of the ordinance is void (R. 1794). A writ of certiorari has been granted to review the holding.

The respondent, Fieldcrest Dairies, Inc. (plaintiff in the trial court), a Michigan corporation incorporated in 1937 (R. 844, 1609-12), filed suit on February 2, 1939 against the petitioners (defendants) in the United States District Court for the Northern District of Illinois, Eastern Division. The respondent had sought a permit from the petitioner Board of Health to sell milk in "Pure-Pak" paper containers in Chicago; the permit had been denied. The complaint (R. 2-15) alleged that the respondent's containers are "sterile, sanitary, and made of non-absorbent material" and are "standard milk bottles" within the terms of the Chicago ordinance requiring milk to be delivered in "standard milk bottles." The action of the petitioners in refusing the permit to sell milk in Pure-Pak containers in Chicago was alleged to be discriminatory and unreasonable, to deprive the respondent of the equal protection of the laws, and to deprive the respondent of its property without due process of law, all in violation of the federal and Illinois constitutions. The complaint prayed (R. 14-15) for (1) a declaratory judgment finding either that the ordinance does not prohibit the respondent from selling milk products in Pure-Pak containers or that, if it does, the ordinance is unreasonable and unconstitutional; and for (2) an injunction restraining the petitioners from interfering with the respondent in selling milk products in Pure-Pak containers in the city. The petitioners filed an answer (R. 16-22) which denied that the respondent's containers are standard milk bottles, are non-absorbent or sterile, or are sanitary containers for the distribution of milk, and denied that the plaintiff is entitled to the relief sought. On motion of the respondent the case was referred

to a master in chancery (the Hon. Jacob I. Grossman) for hearing (R. 123).

While the case was being tried before the master, a new issue arose as to the power of the city to regulate the character of containers used for the distribution of milk within the city. Municipalities in Illinois had been given broad regulatory powers over the production, processing, and distribution of milk by certain provisions of the Illinois Cities and Villages Act of 1872 (Public Laws of Illinois, 1871-72, pp. 231-233, secs. 1, 50, 53, 66, 78), which had not been repealed in 1939 (Ill. Rev. Stat. 1939, ch. 24, secs. 65, 65.49, 65.52, 65.65, and 65.77).* On July 1, 1939, the so-called Milk Pasteurization Plant Act** went into effect (Laws of Illinois, 1939, pp. 660-666; Ill. Rev. Stat. 1941, ch. 56½, secs. 115-134). By this 1939 statute the Illinois General Assembly imposes regulations on the handling, processing, labeling, sale, and distribution of pasteurized milk, including a requirement that single-service (i.e. paper) milk containers be made and transported in a sanitary manner, and authorizes the Director of the Department of Public Health to promulgate minimum requirements for interpretation and enforcement of the act. Section 19 of the act contains a saving clause reading as follows:

> "Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk, and pasteurized milk products, provided such regulation not permit any person to violate any of the provisions of this act." (Ill. Rev. Stat. 1941, ch 56½, sec. 133.)

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* In 1941 the provisions of the 1872 act were incorporated in a Revised Cities and Villages Act (Ill. Rev. Stat. 1941, ch. 24, secs. 23-1, 23-63, 23-64, 23-105, 23-81.

** The entire act is printed in this brief in *Appendix A*.

The respondent placed reliance on this statute in the presentation of the case to the master (see master's report, R. 1732).

The master heard many witnesses, who testified (R. 132-1396) about the manufacture of paper milk containers, their sanitary and insanitary characteristics, their use and regulation outside of Chicago, and the use of glass milk containers in Chicago. Many exhibits were admitted in evidence (R. 1397-1708). The master filed a comprehensive report (R. 1710-36), recommending the denial of the relief sought. His conclusions were that paper milk containers are not "standard milk bottles" and are forbidden by the Chicago ordinance; that the saving clause in the Milk Pasteurization Plant Act of 1939 preserved the pre-existing home rule of municipalities on the subject of the regulation of milk; and that the ordinance is valid. On the question of the reasonableness of the ordinance the master discussed the evidence in detail (R. 1718-13), made specific findings of fact (R. 1734-35), and found *from the testimony of the respondent's witnesses* that the sanitary characteristics of paper milk containers are such that the Chicago City Council may reasonably have decided that their prohibition was necessary to protect the purity and wholesomeness of milk (R. 1734).

[We do not state the facts about the sanitary aspects of the manufacture, processing, and filling of paper containers, because they are recited in detail in the master's report (R. 1718-22). A summary of the testimony of the principal witnesses is given in *Appendix C* in this brief. *Appendix B* is a glossary of technical terms used in the record.]

The trial judge (the Hon. Charles E. Woodward) sustained objections (R. 1738-49) to the master's report and

rendered a decree (R. 1759-61) in favor of the respondent. The decree contained a declaratory judgment that the respondent's paper milk containers are standard milk bottles. It also enjoined the petitioners from interfering with the sale and delivery by the respondent of milk in the City of Chicago in the respondent's Pure-Pak containers. The opinion of the trial court (R. 1752-56), while devoted chiefly to the proposition that the respondent's paper milk containers are standard milk bottles and are not forbidden by the ordinance, also stated that under the 1939 statute (the Milk Pasteurization Plant Act) the City of Chicago was "without power to prohibit the use of single-service containers if such containers conformed to the provisions of the statute." And the opinion stated that the ordinance would be void if it were construed to forbid the use of paper containers; by this the court meant, as indicated by its findings of fact (R. 1756-58), that the ordinance would be "unreasonable and discriminatory and without any reasonable basis" if it forbade the use of paper milk containers.

On appeal by the petitioners to the Circuit Court of Appeals, the opinion (R. 1782-94) was written by Major, Circuit Judge, joined in by Sparks, Circuit Judge, with Lindley, District Judge, dissenting in part (R. 1795-96). The Circuit Court of Appeals held (opinion, R. 1784-88) that the trial court erred in holding that the ordinance permitted the use of paper milk containers and approved the master's conclusion that the respondent's paper containers are not "standard milk bottles." Judge Lindley did not dissent from this portion of the opinion.

The majority opinion stated (R. 1790-93) that the ordinance was void because contrary to the public policy of the State of Illinois as expressed in the Milk Pasteuriza-

tion Plant Act of 1939. After pointing out that this statute permits the use of single-service containers and that the respondent had obtained a state certificate of approval of its pasteurization plant, the opinion said that the right thus conferred by the state was denied to it by the city ordinance. The opinion also said:

> ". . . the state, upon entering the field not only made provision for the sale and distribution of pasteurized milk but recognized, permitted and approved the use of such containers (single-service or paper milk containers), and the ordinance is squarely in conflict therewith." (R. 1793.)

As for the saving clause in the statute (sec. 19 quoted above), the majority opinion stated that it granted the city "the power to regulate paper containers . . . but we are unable to accept the theory that it has authority to outlaw that which the state has legalized." The majority opinion said also (R. 1794) that there was no occasion "to discuss at length or decide" other questions about the validity of the ordinance. Nevertheless the opinion continued with a brief discussion of factors in the case that were said to rebut the presumption of the validity of the ordinance when attacked on constitutional grounds. The majority opinion concluded that the plaintiff was entitled (a) to a declaratory judgment that the ordinance was void in prohibiting the use of the respondent's paper containers and (b) to an injunction "restraining the defendants from prohibiting, but not from regulating, the use of such containers" (R. 1794).

In his dissenting opinion Judge Lindley (R. 1795-96) stated that the ordinance should be sustained, that he was unable to agree that the ordinance violated the public policy of the State of Illinois as expressed in the 1939 statute. He said that the language of the saving clause "was

not meaningless or surplusage as announced in the majority opinion, but rather in the nature of a declaratory clause maintaining the existing status . . . to assure municipalities that their power to act in the premises was not taken away . . .".

Pursuant to the majority opinion a judgment was entered by the Circuit Court of Appeals, reversing the cause and remanding it for the sole purpose of modifying the decree to conform with the views expressed in the opinion (R. 1797). It requires modifications in the decree of the trial court as follows: while the decree contained a declaratory judgment that the respondent's paper containers are standard milk bottles and are permitted by the Chicago ordinance, the modified declaration will be that the ordinance is invalid in prohibiting the use of the respondent's containers; and while the decree enjoined the petitioners "from in any manner or by any means preventing or in anywise interfering" with the sale and delivery of milk by the respondent in its paper milk containers, the injunction ordered by the Circuit Court of Appeals will restrain the peitioners from prohibiting, but not from regulating, the use of the respondent's containers.

There are thus two questions presented.

(1) The holding of the Circuit Court of Appeals that the City of Chicago did not have power to enact the ordinance forbidding the use of paper milk containers involves the construction of grants of regulatory powers made by the Illinois state legislature to the City of Chicago. The question is: did the Illinois Pasteurization Plant Act of 1939 withdraw from the City of Chicago the power to enact the ordinance granted to the city by the Illinois Cities and Villages Act of 1872?

(2) The complaint alleged (R. 11) that the ordinance deprived the respondent of the equal protection of the laws and of its property without due process of law in violation of both the federal constitution (fourteenth amendment) and the Illinois constitution (sections 2 and 13 of article 2). The trial court found that the ordinance would be unreasonable and discriminatory if it forbade the use of paper milk containers. It was not necessary for the Circuit Court of Appeals to decide this constitutional question, since it held that the city had been deprived of the power to pass the ordinance. Nevertheless the majority opinion of the Circuit Court of Appeals sets forth a number of grounds for holding the ordinance unreasonable, indicating that the majority considered the ordinance unconstitutional (R. 1794). There is here a question of the propriety of a judicial pronouncement that a city regulation is invalid under the fourteenth amendment when there is evidence in the record showing that the ordinance is not unreasonable. If this court should decide that the city has power to forbid the use of paper milk containers, the decision of the constitutional question cannot be avoided. On this issue the specific question, under both the federal and Illinois constitutions, is whether or not the respondent has proved that the ordinance, in forbidding the use of paper milk containers, is so palpably unreasonable as to be arbitrary or capricious, so that the provision bears no reasonable relation to the protection of the public health.

Specification of errors.

(1) The Circuit Court of Appeals erred in holding the provision of the Chicago ordinance to be in conflict with the public policy of the State of Illinois.

(2) The Circuit Court of Appeals erred in directing the issuance of an injunction and declaratory judgment in favor of the respondent.

(3) The Circuit Court of Appeals erred in not reversing the finding of the trial court that the ordinance is unreasonable and unconstitutional if it forbids the use of paper milk containers.

(4) The Circuit Court of Appeals erred in not holding that the judgment of the trial court should be reversed and a decree entered in accordance with the findings in the master's report.

Summary of Argument.

I. The Illinois Milk Pasteurization Plant Act of 1939 did not deprive the city of power to pass the ordinance.

The Illinois Cities and Villages Act of 1872 as construed by the Illinois courts granted power to the city to prescribe the character of the containers in which milk is sold and this included the power to forbid the use of paper milk containers. The power was not impaired by the Milk Pasteurization Plant Law of 1939. This is clear from an analysis of the language and a consideration of the purpose of the saving clause in the statute. The Circuit Court of Appeals' construction of the 1939 statute disregards the plain language of the saving clause and violates elementary rules of statutory construction. The Illinois Supreme Court would not have decided the case as did the Circuit Court of Appeals. This court should decide on the merits the question of the city's power.

II. The ordinance is not invalid on constitutional grounds.

(a) The principles governing the validity of the ordinance under the due process clauses of the federal and Illi-

nois constitutions are well settled. Debatable questions as to the reasonableness of the ordinance are for the legislative body and not the courts to determine. The courts may declare health legislation invalid only if palpably arbitrary or capricious. Regulations of containers and many regulations of the milk industry have been sustained.

(b) Evidence in the record shows that to forbid the use of paper containers for delivering milk is not unreasonable. The master found that there are potential public health hazards in the use of paper milk containers. The Circuit Court of Appeals admitted that there was evidence in the record that their use presents a hazard to health. (1) Paper containers are not sterile when formed and do not receive effective bactericidal treatment before they are filled with milk. (2) Paper containers are absorbent. (3) Paraffin from paper containers gets into the milk placed in them. (4) Odors from paraffin and bacteria in paper containers are imparted to the milk. (5) Effective sanitary control of paper containers requires supervision and control of all processes in the manufacture of paper and its conversion into containers. (6) Paper containers are not transparent and cream does not rise to the top in them.

(c) Factors relied on by the District Court and in the majority opinion of the Circuit Court of Appeals are not controlling. The presumption of validity of the ordinance is as strong as when the ordinance was enacted. The use of paper milk containers elsewhere, their regulation by the State of Illinois and in the model ordinance of the United States Public Health Service, the use of paper containers for other purposes, and the proposal by the Chicago Board of Health that the City Council permit their use for delivering milk are factors that are immaterial both in fact and in

law. The prohibition of the use of paper milk containers is not so unrelated to any possible danger to the public health as to be considered an arbitrary interference with property rights.

ARGUMENT.

I.

The Illinois Milk Pasteurization Plant Act of 1939 did not deprive the city of power to pass the ordinance.

A question of construction of Illinois statutes is presented. The Circuit Court of Appeals held the ordinance invalid on the ground that it is contrary to a public policy of the state found by the court to be expressed in an Illinois statute, the so-called Milk Pasteurization Plant Law of 1939 (Laws of Illinois, 1939, pp. 660-666; Ill. Rev. Stat. 1941, ch. 56½, secs. 115-134).* Illinois cities derive their powers from the state legislature and have only such powers as have been delegated to them by the legislature. *City of Chicago* v. *Murphy*, 313 Ill. 98, 101 (1924). Consequently the acts of the Illinois General Assembly must be looked to for the existence and extent of any power exercised by a city.

There is no constitutional objection to regulation of the same subject by statute and by ordinance. In *City of Chicago* v. *Union Ice Cream Co.*, 252 Ill. 311 (1911), the court said (p. 314):

> "... The great weight of authority is to the effect that the legislature may confer police power upon a municipality *over subjects within the provisions of existing State laws.* An act may be a penal offense

* The entire act is printed as *Appendix A* in this brief.

under the laws of the State, and further penalties, under proper legislative authority, may be imposed for its commission by municipal ordinances. The enforcement of one would not preclude the enforcement of the other. (Citing authorities.) Municipal corporations are bodies politic, vested with many political and legislative powers for local government and police regulations, established to aid the government by the State. The necessity for their organization may be found in the density of the population and the conditions incidental thereto. *Because of this, the municipal government should have power to make further and more definite regulations than are usually provided by general legislation and to enforce* them by appropriate penalties." (Italics added.)

Power of Cities under the 1872 Act.

As originally enacted in 1872, article 5 of the Illinois Cities and Villages Act contained the following provisions:

"Section 1. The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

"Section 50. To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same.

"Section 53. To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions.

"Section 66. To regulate the police of the city or village and pass and enforce all necessary police ordinances.

"Section 78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." (Public Laws of Illinois, 1871-72, pp. 231-233.)

Except for minor amendments not material here, there had been no changes in these provisions in 1939. (Sections 65, 65.49, 65.52, 65.65 and 65.77, ch. 24, Ill. Rev. Stat. 1939.) And these provisions are incorporated in the new Illinois Revised Cities and Villages Act which went into effect on January 1, 1942 (ch. 24, secs. 1-1 to 87-5, Ill. Rev. Stat. 1941), the corresponding sections being sections 23-1, 23-63, 23-64, 23-105, and 23-81, ch. 24, Ill. Rev. Stat. 1941. In fact section 23-63 of the new statute is more specific than was section 50 of article 5 of the 1872 statute in granting municipalities power to regulate the manner of selling milk for human consumption. Section 23-63 reads:

> "To regulate the sale of all beverages and food for human consumption; to locate and regulate the places where and *the manner in which any beverage or food for human consumption is sold; . . .*" (Italics added.)

The provisions of the 1872 act have been interpreted by the Illinois Supreme Court to grant cities very broad regulatory powers over the milk industry. A leading case is *Koy* v. *City of Chicago*, 263 Ill. 122 (1914), where the court held valid an ordinance requiring the use of a certain apparatus for the recording of temperatures during the pasteurization of milk. The court said (p. 127) of the above-quoted sections of the Cities and Villages Act:

> "The regulation of the sale of milk and its products is essential to the preservation of the public health, and authority for its regulation is clearly given to the city council by paragraphs 50, 53, 66 and 78 of section 1 of article 5 of the Cities and Villages act." (Citing cases.)

A more detailed statement of the power of the city under the statute was also made (pp. 130-131):

> "* * * There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely and more seri-

ously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and, together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations and to contain certain required information; the milk to be prepared in the manner, at the times and by the means directed and at all times to be subject to inspection. These may be drastic restrictions upon a private business, but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health. The object of all such restrictions is the preservation of the public health, and as a means to that end the protection of the general public against dishonest vendors of milk. They all impose inconveniences and expense upon the dealers in milk, but they are not on that account unreasonable, unjust or oppressive. Legislatures and city councils, in the exercise of the police power, may prohibit all things hurtful to the health and safety of society even though the prohibition invade the right of liberty or property of an individual."

The power of Illinois cities to regulate every detail of the milk industry is here said to extend to requiring "the receptacles in which milk is contained to be of prescribed

character and capacity." Before the *Koy* case the state Supreme Court in *City of Chicago* v. *Bowman Dairy Co.*, 234 Ill. 294 (1908), had held valid an ordinance requiring milk bottles to contain a permanent indication of their capacity.

These broad regulatory powers over the milk industry were possessed by the City of Chicago when it passed a comprehensive milk ordinance on January 4, 1935 (R. 23-112). The ordinance contains regulations of many aspects of the production and distribution of milk. Included was the particular provision involved in this case:

> "Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles." (R. 108.)

This language required the use of the familiar glass milk containers. (So held the Circuit Court of Appeals in this case, R. 1788, the construction of the ordinance being one of the issues litigated in the lower courts.)

The language of the *Koy* case that a city has power under the Cities and Villages Act to require a milk receptacle to be of prescribed character shows clearly that the City of Chicago had power to require milk to be delivered in standard milk bottles, even though the use of a receptacle that was not a standard milk bottle—such as a paper container—was prohibited. So also other devices of the dairy industry that did not meet the requirements of the ordinance were prohibited. Necessarily a regulation that prescribes a standard forbids what does not meet the standard. This was pointed out by the Illinois Supreme Court in *Haggenjos* v. *City of Chicago*, 336 Ill. 573 (1929), where an ordinance that prohibited parking automobiles on streets during certain hours of the day was attacked on the ground that the power to regulate the use of streets did not include the power to prohibit. Of the relative terms "reg-

ulate" and "prohibit" the Illinois Supreme Court said (pp. 576-577):

> "It has been said often that the power to regulate does not include the power to prohibit; and this is true in the sense that mere regulation is not the same as absolute prohibition. Regulation of business or action implies the continuance of such business or action, while prohibition implies its cessation. On the other hand, *the power to regulate implies the power to prohibit except upon the observation of authorized regulation.* The ordinance does not prohibit the standing of vehicles on all streets throughout the city or at all times, but only on some streets at some times." (Italics added.)

The power to regulate the milk industry and milk containers thus included the power to require a prescribed container, and this power included in turn the power to forbid the use of a container that did not meet the requirements imposed. Under the 1872 statute the City of Chicago thus had power to forbid the use of paper milk containers and to enact the ordinance so providing.

Effect of the 1939 statute on the power of cities.

The title of the Milk Pasteurization Plant Law of 1939 is as follows:

> "An Act regulating the handling, processing, labeling, sale and distribution of pasteurized milk and pasteurized milk products." (Laws of Illinois, 1939, p. 660; Ill. Rev. Stat. 1941, ch. 56½, sec. 115; Appendix A, *infra*.).

Sections 1 to 18 of the act contain numerous regulatory provisions, including a requirement in section 15, item 10, that "single service containers . . . shall be manufactured and transported in a sanitary manner". Section 19 is a saving clause. It is the contention of the petitioners that

this saving clause retains intact the regulatory powers of the city that existed before the enactment of the statute. Section 19 reads as follows:

> "Nothing in this act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk and pasteurized milk products, provided that such regulation not permit any person to violate any of the provisions of this Act." (Ch. 56½, sec. 133, Ill. Rev. Stat. 1941; Appendix A, *infra.*)

The meaning of this saving clause is the vital question on this branch of the case. The Circuit Court of Appeals holds that it did not prevent the impairment by the statute of some of the city's power. The petitioners contend that its positive and unambiguous language has been disregarded by this holding.

It is not necessary to analyze the 1939 act in detail to see if it contains anything that is not covered by the terms of the saving clause. The saving clause is in the language of the title of the act. The title describes the act as one regulating the "handling, processing, labeling, sale and distribution" of milk, and the saving clause states that nothing in the act shall impair the power of the city to regulate the "handling, processing, labeling, sale or distribution" of milk—the identical subjects named in the title. The Illinois constitution contains the common provision that an act may embrace only the subject expressed in the title,* so that any subject in the act that is not embraced in the title is invalid. By using the language of the title in the

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* "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. . . ." (Article 4, sec. 13, Illinois Constitution of 1870.)

clause that saves the power of cities and villages, the legislature thus necessarily saved to them their pre-existing power over the entire subject-matter covered by the act. The identity of the language in the saving clause with that in the title thus makes the saving clause as broad as it could possibly be made, so that, whatever aspects of the milk industry may be subjected to state-wide regulation by the statute, cities and villages retain to the fullest extent every power that they had theretofore. This identity of language alone indicates unmistakably that the saving clause preserved the city's power to forbid the use of paper milk containers. But the same result is reached by considering other aspects of the saving clause.

There is only one limitation in the saving clause on this complete retention of the power of cities: the proviso says that city regulation shall "not permit any person to violate any provisions" of the act. By expressing only one exception to the retention of power the legislature has indicated an intention that there is no other exception. This is a clear case for the application of the rule that the expression of one exception excludes other exceptions [see *People* v. *Deep Rock Oil Corp.*, 343 Ill. 388, 401 (1931)]. The ordinance forbids the use of paper milk containers and does not permit a violation of the act. Not being within the exception, the power of the city has been retained.

Only a cursory reading of the saving clause reveals a legislative intention not to make any change whatever in the powers of cities to regulate the sale of milk, including the power to forbid the use of paper milk containers. A detailed exposition of the language of the section leaves no possible doubt of this intention:

"*Nothing in this act . . .*". In spite of these self-explanatory words, the Circuit Court of Appeals finds *some-*

thing in the act that indicates a public policy affecting the powers of cities.

"*. . . shall impair or abridge . . .*". These words mean that the act was intended not to weaken or curtail the power which cities had before the act was passed. Yet the Circuit Court of Appeals holds squarely that the statute makes the city's power less than it was before.

"*. . . the power of any city, village or incorporated town . . .*". The power of cities to regulate milk was derived from the Illinois Cities and Villages Act of 1872 quoted above and interpreted by the Illinois Supreme Court in the *Koy* and other cases.

"*. . . to regulate . . .*". "To regulate" means "to control, govern, or direct by rule or regulation, to subject to guidance or restriction" (Oxford English Dictionary, *regulate*). "Regulate" was the very word used in the grant of power in the Illinois Cities and Villages Act of 1872 quoted above (cities were given power "to regulate the sale of . . . provisions", and to ". . . make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease"). Under that act, as was stated in the *Koy* case, the power to regulate the milk industry included the power to prescribe the character of the receptacle in which milk is sold; and the power to regulate containers included the power to forbid the use of paper containers. The use of the same word "regulate" in the saving clause in the 1939 statute evidences an unmistakable legislative intention that cities may continue to forbid the use of paper containers.

"*. . . the handling, processing, labeling, sale and distribution of pasteurized milk and pasteurized milk products, . . .*". As we have noted, these words describe the field of regulation described in the title of the act. Clearly the

words "sale and distribution" include the type of container in which the product is sold or distributed.

"*. . . provided such regulation not permit any person to violate any of the provisions of this act.*" As we have noted, this single limitation on the power of cities retained by the act indicates an intention that there are no other exceptions. A regulation that forbids the use of particular containers does not permit a violation of any state regulation. This would only be true of a regulation that permitted a type of container forbidden by the statute. The legislature's reason for inserting this proviso in the saving clause is apparent: the other language in the saving clause is so broad that, without the proviso, a city regulation might be valid even though it permitted a violation of the statute.

There is no conflict between the ordinance, which forbids the use of paper milk containers, and the statute which regulates their use. The ordinance cannot be in conflict with a statute that specifically keeps alive the city's power to pass the ordinance. Also, there is no conflict in fact. The statute does not say that paper containers *must* be permitted. It merely recognizes the possible use of paper containers and regulates certain aspects of their use. The City of Chicago's more stringent regulation—forbidding their use—is not in conflict; it merely carries regulation further than the State of Illinois does.

And even aside from the saving clause, the statute permits a city to regulate in the same field. Section 15 of the Act contains 23 items of regulation, requiring in item 10 that single-service containers "shall be manufactured and transported in a sanitary manner." This same section authorizes the Director of the State Department of Public Health to adopt "*minimum* requirements . . . for interpre-

tation and enforcement" of the Act. The use of the word "minimum" indicates that more stringent requirements may be imposed by some agency other than the state. This can only mean a city or a village. The language of the statute thus shows that the legislature intended to permit cities and villages to occupy the same field of regulation as the state and (in the language of the *Ice Cream Company* case) "to make further and more definite regulations."

The purpose of the saving clause is clear. The statute is designed to prescribe minimum sanitary standards that are effective throughout the state, both in urban and rural communities. Some cities and villages, because of special problems created by location or by density of population or merely because of a desire to exercise the utmost vigilance in protecting consumers from contaminated milk, may deem it important to impose higher standards than those imposed by the statute. The necessity for municipal regulation that differs from state regulation was clearly recognized by the Illinois Supreme Court in the *Ice Cream Company* case quoted above (pp. 12-13). It was this necessity that the legislature undoubtedly had in mind in stating in plain and unambiguous language that the power of cities and villages should remain intact. So the saving clause says expressly that municipalities may continue to make regulations as broad in scope and as stringent as those authorized under the 1872 statute, subject to the proviso that the municipal regulations must not fall below the minimum standards fixed by the state. The statute thus places a floor under municipal milk regulations. The power of the City of Chicago to forbid the use of paper milk containers was not affected by the statute.

The Circuit Court of Appeals' construction of the 1939 statute.

While the saving clause says that the 1939 statute shall not impair or abridge the city's power, the Circuit Court of Appeals holds that the city's power is less than it was before the statute was passed. The majority opinion of the Circuit Court of Appeals thus disregards the plain language of the statute. This was the view of the dissenting judge, who in his opinion said that the saving clause "was not meaningless or surplusage, as announced in the majority opinion" but was "in the nature of a declaratory clause maintaining the existing status, inserted by the legislature in an abundance of caution, to assure municipalities that their power to act in the premises was not taken away" (R. 1795). It is significant that the majority opinion does not even mention article 5 of the Illinois Cities and Villages Act of 1872 which, as quoted above, granted the City of Chicago broad regulatory powers over the milk industry.

From the fact that the statute and the regulations of the state Department of Health contain a few regulations of paper containers (such as the provision in item 10 of section 15 that "single service containers . . . shall be manufactured and transported in a sanitary manner"), the majority opinion concludes that "the use of single service containers such as used by the plaintiff for the distribution of milk is permitted and approved upon compliance with the Act" (R. 1791). The opinion stresses the fact that the respondent has complied with the state requirements and has been issued a certificate of approval:

> "By this token it [the respondent] has been authorized by the state to sell and distribute its product within the confines of Illinois in single service contain-

> ers. The city of Chicago, however, by the prohibition contained in its ordinance, denies this right conferred by the State." (R. 1791-92.)

This conclusion fails to take into account the rule that in construing a statute the entire act must be considered. Any certificate of approval granted to the respondent was granted under the statute and, if the respondent may be said to have a "right conferred by the state" to use a container that merely meets state requirements, that right was derived from the statute. This very statute said that the power of cities to forbid the use of paper containers was not impaired. Certainly the "certificate of approval" and any right to use a particular container are effective only within the purview of the statute. As a result a certificate or right granted under the statute is subject to the municipal regulation which the statute expressly permits. When the entire act is considered, this is what the legislature said. The prohibition in the ordinance does not deny a right conferred by the statute when the statute itself says that the prohibition may be imposed.

The basic fallacy in the reasoning of the Circuit Court of Appeals is shown by following the steps by which the conclusion of invalidity was reached. The reasoning of the opinion is: the statute regulates paper containers and permits their use; in prohibiting the use of what the statute permits, the ordinance conflicts with the statute; the rule therefore applies that ordinances may not conflict with the state law; and the saving clause may not be construed to give the city "authority to outlaw that which the state has legalized". The opinion finds the conflict, not with the statute as a whole, but with isolated sections that mention paper containers. The court does not even refer to the saving clause in the statute until *after* it has determined

that the ordinance violates a public policy found in another part of the statute.

In finding a public policy from only a part of the statute and in disregarding the saving clause, the majority opinion violates the familiar rule that in construing a writing the entire writing is to be considered. See *People* v. *Whealan*, 353 Ill. 500 (1933), at p. 506:

> "It is a fundamental rule of statutory construction that the intention of the lawmaker should be deduced from a view of the whole statute and of every material part of it." (Citing many cases.)

Another cardinal rule of construction is violated by the opinion in the disregarding of the language of the saving clause: words should not be held to be surplusage if they may possibly be given effect. In *Crozer* v. *People*, 206 Ill. 464 (1904), the rule was stated (pp. 469-470):

> "It is a cardinal rule of construction that a statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant, but that it shall be so construed, if possible, that every sentence and word shall be given its ordinary meaning and acceptation. (*Decker* v. *Hughes*, 68 Ill. 33; *Thompson* v. *Bulson*, 78 *id.* 277; *Perteet* v. *People*, 65 *id.* 230.) In the last case the following language from Lord Coke is quoted: '*The good expositor makes every sentence have its operation; gives effect to every word; will not construe it so that anything shall be vain or superfluous, but so expressed that one part of the act may agree with the other and all may stand together.*'" (Italics added.)

In view of the language of the saving clause, the opinion finds in the statute a declaration of public policy that is not there. This again violates a cardinal rule of statutory construction, stated in *Sup* v. *Cervenka*, 331 Ill. 459 (1928), where the Illinois Supreme Court said (pp. 461-462):

"It is an elementary rule in the construction of a statute that the intention of the legislature must primarily be determined from the language of the statute itself and not from conjecture *aliunde*. When that language is plain and unambiguous and conveys a clear and definite meaning there is neither necessity nor authority for resorting to statutory construction. *If the words of a statute are plain and the legislative purpose manifest, that purpose must be given effect. The courts have no legislative powers*, and in the interpretation and construction of statutes *their sole function is to determine*, and within the constitutional limits of the legislative power to give effect to, *the intention of the legislature*. They cannot read into a statute something that is not within the manifest intention of the law-making body as gathered from the statute itself. To depart from the meaning expressed by the words is to alter a statute—it is to legislate and not to interpret. . . ." (Italics added)

It is difficult to understand why the Circuit Court of Appeals went as far as it did in disregarding the language of the saving clause. The opinion says of the petitioners' construction of the saving clause, "It would make the state subservient to the city". The effect of the opinion is that it is beyond the power of a state legislature to prescribe minimum standards to be observed throughout the state and at the same time to authorize municipalities to fix more stringent standards if they consider it necessary to do so. If, in such a situation, the state could be said to be "subservient", it has voluntarily assumed that status and has the power to change it when it sees fit. If the state legislature sees nothing incongruous in such a relationship with its municipalities, the mere fact that it may not coincide with the court's conception of the proper symmetrical organization of government is immaterial.

In many jurisdictions there are constitutional and statutory provisions that expressly give municipalities local

home-rule over matters that are also regulated by the state. In fact the saving clause in the 1939 statute merely preserves the home-rule provisions as to milk regulations contained in the Cities and Villages Act of 1872 (now incorporated in the Revised Cities and Villages Act of 1941).

There is no rule of law that, regardless of the scope of the statutory grant of authority, the municipality may not forbid what the state permits. There is, of course, a rule that when a statute and an ordinance conflict or when an ordinance is contrary to a public policy stated in a statute, the statute controls. This rule has been applied in a number of Illinois cases, some of which are cited in the opinion of the Circuit Court of Appeals. *Village of Atwood* v. *Cincinnati, etc. R. Co.*, 316 Ill. 425 (1925); *City of Marengo* v. *Rowland*, 263 Ill. 531, 534 (1914); *City of Chicago* v. *Union Ice Cream Mfg. Co.*, 252 Ill. 311, 315 (1911); *City of Chicago* v. *Drogasawacz*, 256 Ill. 34, 37 (1912). But this rule applies only when the contrary intention of the legislature is not revealed by the express language of the statute. The rule has no application when the intention of the legislature is expressed in clear language as in the saving clause of the Milk Pasteurization Plant Law of 1939. Nevertheless, this seems to be the rule applied by the two majority judges of the Circuit Court of Appeals.

The Circuit Court of Appeals does not mention the most pertinent Illinois case construing legislative grants of municipal power: *City of Ottawa* v. *Brown*, 372 Ill. 468 (1939). It is the most pertinent case because the statute construed contained a saving clause.

The *City of Ottawa* case involved a 1930 ordinance that contained detailed regulations of gasoline filling stations; the defendant was accused of erecting a filling station without frontage consents as required by the ordinance. An

Illinois statute of 1919 regulated "the storage, transportation, sale and use of gasoline" and authorized the state Department of Trade and Commerce to adopt regulations "except in cities or villages where regulatory ordinances upon the subject are in full force and effect." The question in the case was whether or not the saving clause was operative, in view of the provisions of the Cities and Villages Act of 1872* authorizing cities "to regulate and prevent storage . . . of petroleum" and an ordinance of 1916 regulating only the storage of gasoline and not undertaking to regulate filling stations. The court held that by virtue of the 1916 ordinance the city had sufficiently exercised its powers under the 1872 statute to enable it either to amend the 1916 ordinance *or to adopt a broader one;* and that consequently the 1930 ordinance was authorized and valid.

This *City of Ottawa* case presents a great contrast to the holding of the Circuit Court of Appeals. The Illinois Supreme Court held there that the 1919 saving clause, which was less extensive than the one here, preserved the pre-existing powers of the city granted in the 1872 act. The Illinois Supreme Court did not disregard the saving clause but interpreted it broadly and gave full effect to it. Here the Circuit Court of Appeals has not only failed to consider the 1872 act, but has disregarded the language of the 1939 saving clause. It has also disregarded this recent decision by the Illinois Supreme Court showing how the state courts construe legislative grants of municipal

* This is the very statute involved in the case at bar, article 5 of the Cities and Villages Act of 1872 (Public Laws of Illinois, 1871-72, pp. 231-233). Article 5 contains broad grants of powers to cities and villages. While the *City of Ottawa* case involved section 65 of article 5, the instant case involves sections 50, 53, 66, and 78, now incorporated in the Revised Cities and Villages Act (1941) as sections 23-63, 23-64, 23-105, and 23-81 (ch. 24, Ill. Rev. Stat. 1941).

power. Undoubtedly the Illinois Supreme Court would not have decided the case at bar as has the Circuit Court of Appeals.

It is true that the majority opinion of the Circuit Court of Appeals attempts to give the saving clause some vitality by saying:

> "The courts of Illinois have frequently recognized that power exercised by municipalities may be conferred or withdrawn by implication (citing cases). It therefore appears reasonable that the sole purpose of the saving clause was to prevent a construction by implication, withdrawing the vast authority which the city had theretofore had over the milk industry. The ordinance of the City of Chicago and regulations of its Board of Health disclose scores of ways and means by which the industry is regulated, extending from the health of the cow producing the milk, to its delivery at the home of the consumer. The purpose of the saving clause, in our judgment, was to preserve in the city the unquestioned right to continue in a field which had been entered by the state, and in which, thereafter, each should have co-extensive power and authority." (R. 1792-93.)

If the city and the state have "co-extensive power and authority," it would seem that the city has power to forbid the use of paper milk containers; the state clearly has the power even though it has not been exercised. The court's own statement of the purpose of the saving clause is thus inconsistent with its holding that the city regulation is invalid.

This self-contradiction is inevitable, for the language of the opinion cannot conceal the fact that the holding nullifies the saving clause. If there is a need for both city and state regulations, as evidenced by the saving clause, there are bound to be differences between them. *Any city regulation that goes further than the minimum state regu-*

lations forbids what the state regulations permit. Under the holding of the Circuit Court of Appeals, all that remains of the city's power to protect its citizens from a contaminated milk supply would seem to be the empty authority to make regulations that coincide with state regulations. It seems clear that this holding invalidates other provisions of the milk ordinances of Illinois municipalities. For example, section 7 of the 1939 statute contains labeling provisions, requiring milk containers to be marked with the name of the contents, with the word "pasteurized" if the contents are pasteurized, and with the name and the post office address of the pasteurization plant. The labeling provisions in the Chicago ordinance (sec. 3090, R. 37-38) are much more extensive, requiring (among other things) that the date on which the milk is to be sold shall be marked on the container, a regulation designed to insure that too great an interval of time does not elapse between pasteurization and sale to the consumer. The statute permits the use of undated containers and "approves" their use, while the ordinance prohibits the use of undated containers. If the holding of the Circuit Court of Appeals stands, the city requirement is invalid because it conflicts with the "public policy" of the state as expressed in the statute.

The effect of the decision of the Circuit Court of Appeals is far-reaching. Not only the City of Chicago but every city and village in Illinois is deprived of power to make effective local regulations of the milk industry. And the decision goes further. The boundary between the fields of state and local regulations may not be clearly defined. The decision of the Circuit Court of Appeals in effect takes away from the state legislature the power to fix the boundary and the court, in the exercise of its function to construe statutes, assumes the power itself. In fixing the

boundary where it did, the Circuit Court of Appeals has affected adversely the regulatory powers of Illinois cities and villages over other subjects that the state has begun to regulate.

This case presents a simple problem. The 1872 statute gave the city power to forbid the use of paper milk containers. The 1939 statute said expressly that nothing therein impairs the power of cities. The words in the saving clause can mean only what they say and the city still has power to forbid the use of paper milk containers. The 1935 ordinance is therefore valid and the Circuit Court of Appeals erred in holding it invalid because beyond the city's power.

* * * * * * *

The petitioners urge this court to decide on the merits the local question of the city's power.

The petitioners do not ask the court to reverse the case on the mere ground that the Circuit Court of Appeals, as a result of the holdings in *Hawks* v. *Hamill,* 288 U. S. 52 (1933) and *Railroad Commission of Texas* v. *Pullman Co.,* 312 U. S. 496 (1941), should have refused to order an injunction based on its decision of the local, state question of the city's power. The position of the petitioners on this aspect of the case requires an explanation.

The question of the city's power under the 1939 statute was not raised and could not have been raised in the complaint, for the complaint was filed in February, 1939 and the 1939 statute did not become effective until July 1, 1939. The prayer of the complaint (R. 14) sought a declaratory judgment and an injunction on two alternative grounds: (a) the Chicago ordinance permits the respondent to use paper milk containers or (b), if not, the ordinance is un-

constitutional. The only indication in the record about how the question of the city's power was first raised is the statement in the master's report (R. 1732) that the "plaintiff refers" to the statute. The master disposed of the point in one sentence, saying that section 19 "preserves the pre-existing home rule of municipalities" (R. 1732). Similarly the opinion of the trial court discussed the point in only one sentence, saying that under the statute "the city is without power to prohibit" the use of paper milk containers (R. 1756). The trial court's findings of fact, conclusions of law, and decree (R. 1756-1761) did not find or decide that the ordinance conflicts with the 1939 statute, but merely said that the respondent's containers conform with the provisions of the statute. The majority opinion of the Circuit Court of Appeals indicates that the court's decision against the defendants was based on the holding that the city's power was impaired by the 1939 statute, although the two majority judges also indicated that they considered the ordinance unconstitutional.

To remand the cause to the District Court with directions to retain it pending the determination of the state issue in the state courts, as was done in the *Pullman Company* case, would bring much inconvenience to the litigants. The rulings of the lower courts adverse to the city have clouded the powers of Illinois municipalities. Only by obtaining from this court a decision that the city has power to enact the ordinance may the city be restored to the position it had before the decision by the Circuit Court of Appeals. The suit was begun more than two and a half years ago and has gone through the lengthy process of extensive master's hearings, hearings in the trial court on objections to the master's report, an appeal to the Circuit Court of Appeals, and now a review by this court on peti-

tion for certiorari.* If the cause were remanded to await a determination of the question by the highest state court, the far-reaching effects of the action of the Circuit Court of Appeals in cutting down the powers of Illinois municipalities will remain operative for many months to come. The damage done should be remedied as soon as possible.**

There are several factors present here that were absent in the *Pullman Company* case. (1) We have noted the inconvenience to the litigants and the continuance of doubt as to the powers of Illinois municipalities that would result from a remandment of the case for a determination of the question in the state courts. (2) Moreover, unlike the *Pullman Company* case, this case was not instituted for the purpose of having the federal courts determine the local question. One policy behind the decision in the *Pullman Company* case seems to be to discourage litigants

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* In connection with the duration of the litigation, it is important to realize that the petitioners have been unable to take advantage of the provisions of section 266 of the Judicial Code (28 U. S. C. 380) for the speedy determination of constitutional questions in the trial court and on appeal. This is the familiar provision that an application for an injunction to restrain state officers in the enforcement of a statute on the ground of its unconstitutionality shall be heard and determined by three judges and that a direct appeal may be taken to this court from the decree granting or denying the injunction. In this case the respondent sought an injunction on the ground that the ordinance was unconstitutional, the trial court so found, and the trial court entered the injunction prayed. Since the question is the constitutionality of an ordinance rather than the constitutionality of a statute, petitioners have been unable to have the matter determined by a three-judge trial court or to appeal directly to this court. There have been a number of decisions to the effect that section 266 of the Judicial Code does not apply to ordinances. *Cumberland Telephone & Telegraph Co.* v. *City of Memphis*, 198 F. 955 (D. C. Tenn. 1912); *City of Baton Rouge* v. *Baton Rouge Waterworks Co.*, 30 F. 2d 895 (C. C. A. 5th, 1929).

** It has been suggested that the delay caused by a remission of the case to the state courts may be a determinative factor in the decision of this court to pass upon the local question. 54 *Harv. L. Rev.* 1379, 1384 (1941).

from bringing local problems into the federal courts. This policy does not require a remission of this case to the state court when the local question comes into existence, as here, after the filing of the suit and even after the trial of the case has begun (hearings before the master began May 31, 1939, R. 132, and the 1939 statute went into effect on July 1, 1939; at that time the master had heard important testimony, R. 144-440, and depositions had been taken, R. 1333-1396). (3) Unlike the local questions in the *Hawks* and *Pullman Company* cases, the question of the city's power is free from difficulty. This is apparent from the preceding argument. Here, without looking to the decisions of the Illinois courts, it is necessary only to read the plain language of the saving clause in the 1939 statute in order to determine that the statute has not impaired the city's power.

For these reasons the petitioners urge this court to decide the question of the power of the city to enact the ordinance under the 1872 and 1939 state statutes.

II.

The ordinance is not invalid on constitutional grounds.

The validity of the ordinance under the federal and Illinois constitutions was questioned in the complaint. It alleged (R. 11) that the ordinance deprives the respondent of the equal protection of the laws and of its property without due process of law in violation of the fourteenth amendment to the federal constitution * and article 2, section 2 (a due process clause similar to the fourteenth amendment clause) of the Illinois constitution.** Most of

* U. S. Const., Art. XIV, sec. 1: ". . . nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

** Ill. Const. of 1870, art. II, sec. 2: "No person shall be deprived of life, liberty or property, without due process of law."

the evidence heard by the master dealt with the reasonableness of the ordinance as an exercise of the police power. The trial court found, contrary to the master's findings (R. 1734), that the ordinance was unconstitutional (R. 1757). The majority opinion of the Circuit Court of Appeals states (R. 1794) that it does not "discuss at length or decide" this question. However, the opinion continues with a brief discussion of the question that indicates that the two majority judges considered the ordinance unconstitutional. The presumption that the ordinance is valid is said to be "little more than a shadow" because, when the ordinance was passed, the use of paper containers was in its incipient stage. And the evidence in the record that the use of such containers presents a hazard to health is said to carry "little, if any, conviction" in view of other factors—chiefly the fact that the containers are permitted elsewhere.

We discuss as one question (as did the lower courts) the reasonableness of the ordinance under the due process clauses of the federal and Illinois constitutions, although one clause presents a question of federal law and the other a question of state law; as shown by the cases cited below, the same principles govern each clause. And the same discussion covers the question of whether or not the record contains proof of the allegation of the complaint that the respondent is deprived by the ordinance of the equal protection of the laws.

In casting doubt on the constitutional validity of the ordinance, the Circuit Court of Appeals has committed the error of substituting its judgment for the judgment of the Chicago City Council as to the need for the ordinance. Even though only a dictum, this judicial pronouncement of the unreasonableness of the ordinance is an interference with legislative discretion in view of the evidence in the

record. And the constitutional question must be decided if this court holds that the city had power to pass the ordinance. For these reasons the law as to the validity of legislation enacted under the police power and the evidence as to potential public health hazards in the use of paper milk containers must be considered.

(a) Principles governing the validity of the ordinance under the due process clause.

The rules for determining the reasonableness of legislation enacted under the police power have been announced in many opinions. We note a few illustrative cases that indicate the scope of judicial review. In *Standard Oil Company* v. *City of Marysville*, 279 U. S. 582 (1928), the court considered the validity of an ordinance which required that all tanks used for the storage of petroleum products be placed underground. Considerable evidence was heard about the relative safety of storage above and beneath the ground. Mr. Justice Stone delivered the opinion of the court and said (p. 584):

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision." (Citing many cases.)

In *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358 (1910), the court considered the validity of an ordinance which prohibited the burial of the dead within the city and county limits. The ordinance was attacked on the ground that there was no hazard to public health in the maintenance of cemeteries within cities. The court in its opinion (by Mr. Justice Holmes) showed clearly its re-

luctance to substitute its judgment for that of the municipal legislative body (p. 365):

> "But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded." (Citing *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1904), where the compulsory vaccination statute of Massachusetts was held valid.)

Schmidinger v. *Chicago,* 226 U. S. 578 (1912), involved the validity of an ordinance prescribing the weights for loaves of bread and prohibiting the sale of any loaves of bread which did not comply with the prescribed weights. Concerning the validity of this ordinance the court said (pp. 587-8):

> "* * * It is contended that the limitation of the right to sell bread which this ordinance undertakes to make in fixing a standard loaf * * * is such an unreasonable and arbitrary exercise of legislative power as to render it unconstitutional and void. This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred." (Citing many cases.)

The presumption that the ordinance is valid is as strong on appeal as in the trial court. In *So. Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1936), a three-judge district court enjoined the enforcement of a statute forbiding the use on highways of trucks exceeding a prescribed width. In reversing the decision of the trial court, Mr. Justice Stone said at pp. 191-2:

> "Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, *its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard.* (Citing cases.) Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination *we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis.* (Citing cases.) Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment." (Italics added.)

The Illinois Supreme Court applies the same rules as the United States Supreme Court in considering the validity of legislation enacted under the police power. See *People* v. *Quality Provision Co.*, 367 Ill. 610 (1938), where the court noted that legislation will not be held unreasonable if the subject may be regarded as debatable (p. 614). See also *Gundling* v. *City of Chicago*, 176 Ill. 340 (1898); *City of Chicago* v. *Bowman Dairy Co.*, 234 Ill. 294 (1908); *City of Chicago* v. *Arbuckle*, 344 Ill. 597, 604-5 (1931).

These principles have recently been applied to uphold the regulation of containers in a case that seems controlling in the case at bar: *Pacific States Box & Basket Co.*

v. *White,* 296 U. S. 176, 181-182 (1935). The regulation there held valid required that raspberries and strawberries be packed only in certain containers called "hallocks" of specified dimensions. One of the reasons there given by Mr. Justice Brandeis for holding the regulation not invalid was that "the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only perishable but tender." At page 182 Mr. Justice Brandeis said:

> "Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted."

A great variety of regulations of the milk industry have been sustained. In *Koy* v. *City of Chicago,* 263 Ill. 122, 130 (1914), the Illinois Supreme Court termed the regulation of the sale of milk "an imperative duty." *Nebbia* v. *New York,* 291 U. S. 502 (1933), upheld a state law that authorized an administrative board to regulate the price of milk. (The opinion of Mr. Justice Roberts at pp. 521-530 contains a comprehensive review of cases involving police power regulations.) We cite other cases holding milk regulations valid as indicated:

Adams v. *Milwaukee*, 228 U. S. 572, 583 (1911), an ordinance prohibiting milk to be brought into the city unless it was produced by tuberculin tested cattle.

Commonwealth v. *Wheeler*, 205 Mass. 384, 91 N. E. 415 (1910), a statute fixing a minimum standard of butter fat content for milk and prohibiting the sale of substandard milk.

City of Milwaukee v. *Childs Co.*, 195 Wis. 148, 217 N. W. 703 (1928), an ordinance prohibiting the sale of milk except in the original containers.

Pacific Coast Dairy v. *Police Court*, 214 Cal. 668, 8 Pac. 2d 140 (1932), a statute imposing a penalty for not returning milk containers marked with the registered brand of the owners.

City of Chicago v. *Bowman Dairy Co.*, 234 Ill. 294 (1908), an ordinance requiring milk bottles to contain a permanent indication of their capacity.

(b) Evidence in the record shows that the prohibition of paper containers for delivering milk is not unreasonable.

There is no need to labor the obvious point that the regulation of the distribution of fresh milk is a vital necessity, particularly in a city the size of Chicago. The production and distribution of 1,300,000 quarts of an easily contaminated liquid daily consumed in Chicago obviously give rise to special problems of regulation. And a peculiar importance is attached to milk regulations by the fact that milk is the staple item in the diet of infants.

The master heard much evidence on the question of the validity of the ordinance as a reasonable exercise of the police power. More than twenty witnesses testified for the

respondent (R. 132-940, R. 1243-1306) and nine witnesses testified for the petitioners (R. 942-1242). Approximately 120 exhibits were admitted in evidence (R. 1397-1708). There was admittedly testimony by some of the respondent's witnesses that the respondent's containers are sufficiently sanitary to permit their use for delivering milk. On the other hand, the testimony of the respondent's own witnesses revealed that paper containers have characteristics that create serious public health problems.

This is apparent from the master's report. After reciting the facts about the manufacture, processing, and filling of paper containers (R. 1718-22), the master found (R. 1723) that a legislative body might reasonably conclude that contamination might occur at one or more of the many stages from the pulp to the sealed container through carelessness, desire to save expense, inadequate facilities, or other reason. The master then discussed the evidence and made findings about the following matters: absorbency of paper containers (R. 1723-24), paraffin particles in the milk (R. 1724), odors from paraffin or bacteria (R. 1724-26), effective sanitary control of paper containers (R. 1726-29), non-transparency of paper containers and non-rising of cream to the top of containers (R. 1729-30). The master continued with the following general finding:

> "I find that there is evidence in the record, from plaintiff's own witnesses, independent of the corroborative testimony of Dr. Arnold, the City's witness, from which the City Council could reasonably have concluded that prohibition of paper containers was necessary and appropriate to protect the purity and wholesomeness of milk, or, to state the proposition another way, it is at least doubtful whether plaintiff has proved that there is not sufficient evidence tending to establish a reasonable basis for such conclusion." (R. 1734.)

The master then made specific findings of fact (R. 1734-35):

"I find that the legislative body may reasonably have based its decision on evidence tending to prove the following:

"There are steps in the manufacture, conversion and filling of paper containers in which bacteria may get into the walls of the containers.

"Paper containers, even when paraffined, are to some extent absorbent and the milk may absorb such bacteria.

"Sanitary conditions differ from one paper mill to another and even in the same mill from time to time.

"The sanitary condition of the mill is a significant factor as to the condition of the finished container.

"The sanitary condition of the paper board blank determines the sanitary condition of the finished container.

"Particles of paraffin get into the milk and constitute a foreign substance which preferably should not be in milk, especially for babies.

"Odors from paraffin, whether the paraffin is fresh or not, may get into the milk.

"If the paper board contains a high amount of bacteria, there may exude objectionable odors which may get into the milk.

"The control and precautions by paper manufacturers themselves may not be adequate.

"In the case of glass milk bottles, the City has the cleaning process at hand locally and can exercise complete control; in the case of paper containers, inspection at remote places may be necessary but impractical or too expensive.

"Some paper containers have been shown to contain high bacterial counts.

"Paper containers are not transparent as glass bottles, so that it is difficult to observe the quality of the milk or whether the milk contains dirt or other foreign body.

"Cream does not rise to the top in paper containers, so that purchasers may not readily know whether they are getting milk of the required fat content.

> "The United States Public Health Service Sanitation Board in June 1939 criticized paper containers on account of their absorbency and the sloughing off of paraffin."

The master concluded that the court must hold the ordinance valid and the prohibition of paper containers reasonable, and recommended that the court should not issue the injunction or render the declaratory judgment requested. (R. 1735-36.)

The majority opinion of the Circuit Court of Appeals said of the evidence about the reasonableness of the ordinance: *"It is true the record discloses some evidence in support of defendants' contention that the use of such containers presents a hazard to health"* (R. 1794). Without more this evidence would seem to be enough, under the applicable principles of law discussed above, to show that a court would be interfering with the legislative discretion of the Chicago City Council in holding that the ordinance was unreasonable in forbidding the use of paper milk containers. This was the view of the dissenting judge who stated:

> "The master found upon substantial evidence a number of facts bearing upon the undesirability of the use of paper milk bottles, showing clearly that at least the question of desirability of their use is debatable. In such case the city council is entitled to exercise its own administrative and legislative judgment,—a judgment not to be superseded by verdict of a jury or decision of a court." (Citing cases.) (R. 1796.)

This being the state of the record, the case of *Standard Oil Company* v. *City of Marysville*, 279 U. S. 582 (1928), shows that the record establishes the reasonableness of the ordinance as an exercise of the police power. In that case, as in the instant case, voluminous evidence was taken before the master. There much of the evidence was "con-

flicting, speculative and theoretical in character, concerning the relative safety of storage of petroleum products above and beneath the surface of the earth" (opinion, pp. 583-584). The master there made elaborate findings of fact, concluding that the ordinance was invalid, and the master's report was followed by the trial court. The action of the Circuit Court of Appeals in reversing the trial court was upheld in the Supreme Court. The findings of the master, although adverse to the validity of the ordinance, showed that there were dangers involved in storing gasoline above-ground as well as below-ground, the latter being required by the ordinance. Of the master's findings Mr. Justice Stone said (p. 584):

> "To determine that the present ordinance was a permissible exercise of legislative discretion, as thus defined, we need not go beyond those findings of the master to which petitioners offer no serious challenge."

So here the findings of the master based upon the testimony of the respondent's own witnesses show that the prohibition of the use of paper milk containers was a permissible exercise of legislative discretion.

This is apparent from a discussion of some of the characteristics of paper milk containers which show that their prohibition is clearly warranted by the necessity of protecting the city's milk supply. The following discussion is based almost exclusively on the testimony of the respondent's witnesses.

1. Paper milk containers are not sterile when formed and do not receive effective bactericidal treatment before they are filled with milk.

The complaint alleged repeatedly that the paper container advocated by the respondent is "sterile" (R. 4-8). To support these allegations the respondent's witnesses

resorted to a novel definition of what was termed "commercial sterility," and thus were enabled to testify that paper containers are "commercially sterile." This is illustrated by the following excerpts from the direct examination of Dr. Tracy:

> "Q. Have you an opinion from your experiments and from your research work, Doctor, now, as to whether this Pure-Pak Container is a sanitary sterile milk container?
>
> "A. I consider the Pure-Pak Container a sanitary container. I wouldn't consider it was sterile, if you put the proper interpretation on the word 'sterile'" (R. 510).

The evidence shows that empty paper containers may have bacterial counts higher than the permissible maximum. The respondent's witness Woodman testified about the bacterial content of paraffined, unfilled paper containers from the respondent's plant. Seven per cent of the hundred containers examined by the witness showed a bacterial count of more than the permitted maximum of 1000 per quart (R. 674). Prucha's examination of 70 examples of paper board, designed for use in paper milk containers and submitted by 5 different paper mills, showed that 42 samples of the 70 examined had a bacterial content, by disintegration test, of more than 100 colonies per gram, the maximum number permitted by the standard set by the United States Public Health Service in 1939. *Four* of the 70 samples examined showed no growth (R. 792-7; defendant's exhibit 7, R. 1671).

Because of the great heat applied, glass containers are absolutely sterile when manufactured (R. 169). Although a glass container is reused, it is thoroughly cleaned before each use, and the respondent's witnesses testified that with the best method of sterilization it is possible to obtain

a sterile glass container (Sanborn, R. 170). Dr. Tracy, an admitted partisan of paper containers (R. 526), testified that he had frequently visited dairies in Chicago (R. 659, 708-9) and had never observed any discrepancies in the washing of bottles in Chicago (R. 488-9). As to bacterial counts made at the University of Illinois dairy, he also testified that bottles washed in a soaker-type bottle washer ("operated essentially on the standards of the City of Chicago," R. 162) did not have a bacterial content higher than 600 per bottle (R. 490).

Not only is the paper in the paper container not sterile as manufactured; it cannot be made sterile before it is filled with milk. Paper containers are dipped in hot paraffin before they are filled with milk, but the application of paraffin does not produce an effective bactericidal result. There is an agreed statement in the record that, if the respondent's witness Prucha performed an experiment to ascertain whether or not the application of paraffin had a bactericidal action, the result would be: "paraffining will not kill all of the bacteria in the paper" (stipulation, par. 6, R. 127).

Dr. Sanborn testified that in his opinion the primary purpose of the application of paraffin is to moisture-proof the container, and "in addition to that, the paraffining *may* act as an additional sanitary safeguard, in that *certain* bacteria which *may* be present *might* be killed by the temperature of the melted paraffin" (R. 176). He testified again (R. 194) that paraffin as applied to paper containers "is not an effective sterilizing agent."

Perhaps the most significant evidence of the lack of effectiveness of paraffin as a bactericidal agent lies in the stress placed upon sanitary conditions in the mill in which the paper is manufactured by all of respondent's witnesses

who had any real knowledge of the sanitary condition of paper containers. If the application of paraffin was an effective sterilizing and moisture-proofing process, then it would be unnecessary to devote any attention whatsoever to the sanitary conditions under which the paper was manufactured. The record shows, however, that all of the energy of the leading scientists who have considered the subject is devoted to the matter of achieving sanitary conditions in paper mills and in the subsequent processing of the paper into containers. (See articles, Prucha, *Are Paper Milk Containers Sanitary?*, R. 1600-08; Sanborn *Mircrobiology in Pulp & Paper Manufacture*, R. 1665-70.)

It is not unreasonable to require the use of a container that can be sterilized immediately before use, as opposed to one that cannot be so sterilized.

2. Paper containers are absorbent.

The complaint alleged repeatedly that the respondent's paper container was non-absorbent (R. 4, 5, 8). During the course of the trial this allegation was demonstrated to be completely false by the respondent's own witnesses. Dr. Prucha stated that experiments to be made pursuant to a stipulation between the parties would show that paraffined paper containers were absorbent. The object of Experiment No. 1 was to ascertain whether or not fresh fluid milk would absorb substances contained in the cardboard wall of the finished container. Dr. Prucha's answer was affirmative (Stipulation, R. 127-28). All of the containers examined by Dr. Prucha showed absorption (R. 802). Dr. Tracy testified (R. 524) that he found Pure-Pak containers absorbent.

The United States Public Health Service states:

> "The porous condition of paraffined containers now available and the sloughing off of particles of paraffin into the product are undesirable, and manufacturers of single-service containers are urged to make every effort to provide a non-absorbent non-flaking surface" (plaintiff's exhibit 61, R. 1591).

The absorbency of paraffin paper containes is of the utmost significance. It means that whatever is in the paper gets into the milk, even though the absorption is slight. As a result, the sanitary condition of the container does not depend merely upon the surface of the container but upon the sanitary condition of the paper from which the container is made. Another result is that the sanitary condition of the container cannot be effectively controlled by inspection and supervision of the dairies in which milk is placed in the container; the sanitary conditions in the paper mill in which the paper is manufactured determine to a large extent the sanitary quality of the container. The following paragraphs from Dr. Sanborn's direct examination indicate the importance of the sanitary condition of the paper from which containers are made:

> "The condition of the paper from which the container is made, the condition of the paper blank, the bacteriological condition of the paper determines the condition of the finished container. We have proven bacteriologically and by scientific methods that the paper blank that has a low bacterial count yields containers that have low bacterial count. On the other hand, paper board that has high bacterial counts—and of course there have been many such, because this thing has been in experimentation for a long time, and you run into paper board that has higher bacterial counts and those containers will also have high bacterial counts; so there is a direct connection between the sanitary condition of the blank and the sanitary condition of the finished container. That was

true in spite of any of the other factors I mentioned. Our investigation included, for example, investigation of paraffin. There are only three things, the paper, the adhesive that closes it and moisture proof paraffin that moisture proofs it. We were able to show and it has been proven conclusively that the paraffin is not a source of appreciable contamination: in fact, fully refined paraffin and used paraffin are essentially sterile. My investigation of adhesives has shown that there is no contamination from the adhesives, I mean the adhesives used are essentially sterile; so that that eliminates those two factors, that we went to right from the start. That leaves the paper board and that is one of the direct reasons why I stated that the bacteriological condition of the original board determines the final condition of the finished container bacteriologically; it is fundamentally important; it is essential that the paper board have a low bacterial count'' (R. 193-94).

"* * * Dirty contaminated paper board must never be used for milk because bacteriological tests on such board, even well paraffined board, are not satisfactory. The board used must be a sanitary bacteria-free board, essentially bacteria-free, to start with'' (R. 195).

Dr. Tracy testified to the same effect and emphasized the sanitary condition of the water used in the paper mill as important in determining the sanitary condition of the container. Dr. Tracy had tested the quality of the water supply at two paper mills then engaged in making paper for milk containers. Both water supplies showed the presence of B-coli—the sewage or intestinal bacteria. One of these mills was the mill at which the paper in respondent's container is manufactured (R. 512-13).

Perhaps the clearest connected picture of the sanitary significance of the absorbency of paper containers is in the testimony of the respondent's leading witness, Dr. Sanborn (R. 198-222, 230-43). Another interesting discussion of problems of mill sanitation by the respondent's witness,

Dr. Sanborn, appears in his article, *Microbiology in Pulp and Paper Manufacture* (R. 1665-70).

If paper containers were not absorbent, the material of which they were made and the sanitary conditions surrounding their manufacture would be matters of no public health significance. But with absorbent paper containers, the sanitary conditions in the paper mills, which vary from mill to mill and from hour to hour within a single mill (R. 213), determine to a large extent the sanitary quality of the finished container.

The only absorbency problem with the glass bottle is in the paper cap, but the problem is not of comparable significance. The area of the cap is very small in comparison with that of the entire paper container (see R. 279-81). Also, there is not a single fold in the paper cap, as there is along each of the many edges of the paper container, and the paraffin is more likely to chip off on the inside edges and corners of the container than on the flat surfaces.

After hearing the witness testify, the master found:

> "a legislative body might reasonably be of the opinion that there is some danger that the walls of the finished paper container may contain bacteria, and that, by reason of the absorbency of the container walls, even when paraffined, the bacteria may get into the milk" (R. 1724).

The master continued that the amount of absorbency is unimportant, the weight to be given being for the determination of the legislative body. In support of this statement the master cited *City of Chicago* v. *Arbuckle*, 344 Ill. 597 (1931), where the court said (pp. 604-5):

> "It is argued on behalf of the plaintiff in error that if there is any question of public health connected with the distribution of the articles dealt in by it the

question is very remote; that most of the operations involved in the preparation of its products are accomplished through the use of automatic machinery; and furthermore, that teas and coffees, before consumption, are prepared with boiling water in the home and spices and flavoring extracts are used sparingly in cooking. However remote the question may be, whether it exists and the degree of its importance are for the determination of the city council, and while its determination is not final, it will not be set aside if there is any reasonable relation between the action of the council and the public health. * * *"

It is not unreasonable for the City of Chicago to require that milk be distributed in a nonabsorbent container.

3. Paraffin from paper containers gets into the milk placed in them.

The record is clear that paper containers contribute paraffin to the milk that is placed in them. As noted above, the United States Public Health Service called attention to "the sloughing off of particles of paraffin into the product" as undesirable and urged manufacturers of paper containers to provide a non-flaking surface" (plaintiff's exhibit 61, R. 1591).

Respondent's witness Tracy testified that there is a need for a waterproofing material better than paraffin because of the tendency of paraffin on the inside of the paper container to chip off and get into the milk (R. 523, 4). He also testified that he put water in paper milk containers, sent them over the usual delivery route, and then examined for paraffin. There was paraffin in every one of the containers examined (R. 518).

Petitioners' witness Martinek confirmed Dr. Tracy's testimony. Martinek, who is in charge of the chemical laboratory of the Department of Health of the City of Chi-

cago, testified as to tests conducted to determine the presence of suspended paraffin in the milk in paper containers. Every one of the 138 containers examined revealed the presence of suspended paraffin, undissolved, in quantities ranging from 1 milligram to 107 milligrams per quart (R. 1009).

The significance of the presence of undissolved paraffin in milk which is fed to infants is apparent from the testimony of Dr. Robert A. Black, a pediatrician. He said that he preferred to have milk for children not adulterated with paraffin; that in the handling of babies even the appearance of evil is to be avoided (R. 1226-27). Although respondent's witness Dr. Vaughan testified as to the harmless effect of paraffin in liquid form, he also said that *undissolved* paraffin would go through the intestinal tract "as a foreign body" (R. 1306).

The right of the city to prevent the use of containers which adulterate the milk by the addition of a foreign substance is clear, regardless of whether or not the substance added is injurious to public health. *City of St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621 (1905), involved the validity of an ordinance which prohibited the sale of milk containing "any foreign substance of any kind whatever, or coloring matter, or any adulteration or preservative • • • for any purpose whatever." The plaintiff added formaldehyde to milk for the purpose of preventing it from souring. The ordinance was sustained against the contention that the preservative added was harmless and indeed beneficial to public health. Concerning the claim that the constitutional rights of the distributor of the milk were violated by the statute, the court said, p. 624:

> "• • • He had the right to sell pure and unadulterated milk of the standard prescribed by the ordinance and the purchaser and the consumer of milk had the

> right to purchase from him pure milk unmixed with any foreign matter added to it, and this was what the ordinance required, no more and no less, and in so doing it infringed no provision of the organic law of this state or any article of the federal Constitution."

In *Commonwealth* v. *Schaffner,* 146 Mass. 412, 16 N. E. 280 (1888), the ordinance involved prohibited the adulteration of milk by the addition of a foreign substance. The defendant added a coloring matter called "Annato," and urged the invalidity of the ordinance upon the ground that the added matter was not injurious to health. The court said, p. 282:

> "It was immaterial whether the addition of the *annato* coloring matter was, or was not, injurious to health. The addition of pure water is punishable under the statute."

By statute in Illinois the addition of *any* foreign substance to milk or cream intended for sale or exchange is an adulteration. (Ill. Rev. Stat. 1939, chap. 38, sec. 14.)

The master found (R. 1724) that the legislative body charged with the "imperative duty" (*Koy* v. *City of Chicago,* 263 Ill. 122, 130) of regulating the purity of milk might not unreasonably refuse to permit such foreign substances as paraffin in milk, especially in milk for infants.

An ordinance is not unreasonable in prohibiting the use of milk containers that add a foreign substance to the milk.

4. Odors from paraffin and bacteria in paper containers are imparted to the milk.

It is a well-known fact that milk rapidly absorbs odors to which it is exposed. The evidence shows that there are two sources of odors in paper containers.

That paraffin has an odor was established by a simple gesture on the part of respondent's witness Dr. Sanborn at the hearing before the master. On direct examination, when asked whether or not a particular paper milk container, plaintiff's exhibit 31, had been paraffined (R. 293-4), he picked up the container and smelled it once or twice. His explanation of that action appears from the following excerpt from his testimony:

> "That is a mechanical operation I go through in examining containers of any kind; when I have a specimen to look at, I usually go through a certain number of procedures such as that.
>
> Q. Why did you smell it?
>
> A. To see if I can detect any odor.
>
> Q. What would the presence or the absence of odor indicate to you, Doctor?
>
> A. By the type of odor I detect I might be able to arrive at the reason for it. * * * I didn't remember I had done it when it was mentioned because it is an automatic process to me. I do recall that I did so.
>
> The paraffin might have been overheated and on certain containers the paraffin is heated too hot and if it is heated too hot they are likely to detect certain products of decomposition due to overheating.
>
> Q. What temperature range will produce those products of decomposition?
>
> A. I can give no definite answer to that, as to the temperature that might cause it.
>
> Q. Can you give some temperatures that are certain?
>
> A. Not only the temperature but the renewal of the paraffin is a factor there. If it is renewed, there will be less chance, even at high temperatures of heating any such off color. It is accompanied by a change in color as well as odor; it is a sign of breakdown, so that the renewal of the paraffin has an effect, if the paraffin bath—
>
> Q. * * * If you recoat that paraffin, you will cover the odor?
>
> A. No.
>
> Q. What do you mean by renewal of paraffin?

A. By changing the paraffin in the bath, cleaning the tank out and putting the thing through a spraying process, and you cannot detect any possible breakdown, but if you allow it to go two or three weeks and don't change it, it becomes in that condition and—

Q. That is in addition to the temperature?

A. Yes, sir" (R. 303-4).

Thus the temperature of the paraffin bath and the length of time for which the paraffin is heated are factors involved in creating an off-odor and an off-color to the paraffin on the container.

Respondent's witness Keyser testified that oxidation of paraffin will begin at relatively low temperatures and that there will be no appreciable oxidation below the melting point of the wax (in this case about 125° F.). He also testified that the nature of the products of oxidation is acid (R. 1347-8).

Respondent's witness Peterson testified that the oxidation of paraffin gives it a rancid odor (R. 950). Although his testimony differed from Keyser's about the temperature at which paraffin oxidizes, his testimony shows that there is no way of determining for how long a period the paraffin in the bath is heated (R. 950-51). Paraffin is fed to the machine as needed and, no matter how quickly paraffin is used up in coating the containers, the paraffin put in last may be used first with the result that some paraffin may remain in the bath for long periods of time. The same paraffin may remain in the bath from day to day, because the paraffin removed from the machine at the end of the day is kept and used the next day (R. 961). According to Peterson's testimony, even a fresh paraffin bath has "a distinctive sweet paraffin odor," though "very mild" (R. 951).

Another source of odor in paraffin containers is bacteria. The witness called by the master, Dr. Rice, testified that he conducted tests with respect to a paper container which were designed to reveal the bacteria present in the container which might be transmitted to the fluid put into the container (R. 418-9). His test indicated three containers with a bacterial count of less than 1,000 colonies per container out of 23 samples, and five containers with a count of 1,000 per container. Thirteen of the containers had bacterial counts above 1,000 per container ranging up to 26,000 colonies. He described the odors emitted from the bacterial colonies contained in the paper. Those odors ran the gamut from "stale" "fishy," "musty," "wet dog," to "foul," "fecal," and "putrid" (R. 416-9).

On this issue the master found that the City Council, in prohibiting paper containers, may have taken into consideration the following: "the possibility of rancid odors from oxidized paraffin being imparted to the milk," "the so-called sweet odors of pure paraffin," and "the possibility of objectionable odors from large counts of bacteria in the paper getting into the milk" (R. 1725-26).

It is not palpably unreasonable and arbitrary to prohibit the delivery of milk in containers that impart an odor to the milk.

5. Effective sanitary control of paper containers requires supervision and control of all processes in the manufacture of paper and its conversion into containers.

The testimony of respondent's witnesses shows the necessity of inspection by health officials of all processes in the making of the paper container. Since the glass container can be effectively sterilized at the dairy when it is being filled with milk (Sanborn, R. 169), there is no need to in-

spect any aspect of the glass container before the cleaning process at the dairy. The only possible sterilizing action on the paper container at the dairy is the accidental fact that the container is immersed in hot paraffin to give it a coating. Paraffined paper milk containers are absorbent; they cannot be effectively sterilized at the dairy before they are filled with milk. As a result, effective control of the sanitary quality of paper containers requires supervision and inspection of all the many processes of manufacture and all the various materials used in making paper containers. This means that inspectors must be sent from the place of milk distribution to numerous paper mills and converting plants throughout the country.

The two methods commonly used to test the bacterial content of paper containers cannot be safely relied on by local health officers. The rinse test determines only the number of bacteria on the inside surface of the container, giving no indication of the bacterial condition of the walls of the container. The disintegration test is not reliable for several reasons. The bacterial condition of paper is not uniform. For example, paper easily acquires "slime spots" and "brownish patches" during the process of manufacture, and these small areas are likely to have a higher bacterial content than other portions of the board (R. 721, 738). While all testing is necessarily done by the sampling method, on the theory of probabilities, tests obviously became haphazard when there are likely to be great variations in the material tested (see Prucha, R. 736-9).

The unreliability of rinse and disintegration tests to indicate the sanitary conditions in the manufacture of paper containers is also shown by the testimony of respondent's witness Sanborn. He testified that rinse tests conducted to determine the bacterial condition of the finished container are apt to be misleading without knowledge and control of

the bacterial condition of the board (R. 255-6). And he testified also that while disintegration tests could be an index to the sanitary condition of manufacture in a paper mill, he did not think it advisable, from a sanitary or public health point of view, to rely alone upon disintegration tests to determine the sanitary quality of the paper board (R. 232-3).

As for the need of inspection, Dr. Sanborn testified that the sanitary condition of paper mills is dependent upon numerous factors. These factors and the sanitary condition of the paper mill and its products vary from mill to mill and within the same mill from week to week, from day to day, and from hour to hour. Determination of these factors involves inspection of the mills (R. 209-21). Dr. Sanborn also testified that it is more expensive for a paper mill to produce paper of a high sanitary quality than to produce paper of a low sanitary quality and that only economic factors prevent paper mills now engaged in making other products from producing paper board for milk containers (R. 234-42).

Respondent's witness Prucha said in his October, 1937, address to the International Association of Milk Sanitarians:

> "Milk sanitarians should inspect paper mills and check on the pulp. In the first place, the water used for diluting the pulp usually comes from polluted streams or lakes. Some paper mills have proper sanitary control over the water supply while other paper mills have not.
>
> * * * * * *
>
> "Where paper is made for milk containers some medical examination of the worker handling and packing the paper should be required. Some mills have such standards. Occasional inspection of the premises and of the bundles of the paper are desirable. The Chicago Carton Company, where the containers are

> cut and printed, was found in an excellent sanitary condition. If paper containers become extensively used, such an establishment should be visited and inspected by milk sanitarians." (Plaintiff's Exhibit 62, R. 1593-4.)

In his testimony Dr. Prucha said that some certifying agency might be set up to avoid the necessity of making visits to the mills by local health officers (R. 731), although he did not know any other instance where an inspection device of that kind had been used (R. 734). He testified unequivocally that some inspection or certification should be made (R. 733-4).

The need for control and inspection of paper mills is also shown by testimony about the need of sanitary standards in paper manufacture. Dr. Sanborn stated (R. 244-5) that in his opinion, in the interest of public health, standards governing the production of paper board for use in paper milk containers and governing the subsequent processing and handling of that paper board until the container is filled with milk should be formulated, adopted, and enforced by public health authorities. Unless inspection is to be made, the formulation of standards is obviously meaningless. Without inspection, there can be no enforcement.

It is significant that the United States Public Health Service, when amending its model ordinance to permit the use of paper containers, recommended the adoption of regulations *which require inspection of paper mills and of converting or fabrication plants.* Plaintiff's exhibit 61 contains the regulations suggested by the Health Service advisory board in June, 1939. Included were the following:

> "(5) The manufacture, packing, transportation and handling of single-service containers and container caps and covers are conducted in accordance with the following requirements. *Inspections required herein*

may be made by the health officer or by any agency authorized by him. • • •

"(c) All operations at the fabrication plant and during transportation of the manufactured articles shall be so conducted as to reduce to a minimum the possibility of contaminating the manufactured articles, as prescribed in items 13p, 14p, and 15p" (R. 1590-1).

There is no "agency authorized" by health officers to inspect paper mills and fabrication plants (Prucha, R. 734). And obviously inspection is required by health officers to see that regulations of the kind quoted are complied with. As a result, inspection of the manufacture of the container requires visits to paper mills by health officers, and inspection of the converting process requires trips to converting plants.

The unreliability of rinse and disintegration tests is indicated by the fact that *tests alone are not relied upon today* in Chicago in supervising the milk supply.

This is shown in the record. While the ordinance (sec. 3092, R. 40) requires that samples of milk be taken and tested bacteriologically, it also (sec. 3091, R. 39) requires the Board of Health to inspect dairy farms and milk plants whose milk is intended for consumption in Chicago. There are elaborate regulations of the Board of Health governing all aspects of milk production from the health of the cow to the vehicles used in making delivery to the consumer (see, for example, items 1r to 26r and items 1p to 23p, R. 45-108). The "public health reasons" noted under section 3092 state expressly that a low bacterial count "does not necessarily mean that diseased organisms are absent" (R. 41). Similarly in supervising the use of glass containers, the Board of Health does not rely alone on the rinse test or any other test. There are regulations about the cleaning and bactericidal treatment of containers (item 12p,

R. 87), including requirements for the method of sterilization, the caustic alkali content of the solution used, etc. (R. 89-90). Also inspections are made regularly ("once or twice a week, but at least every two," R. 970) of bottling establishments, including the operation of the washing equipment, the temperatures of the solutions used, etc. (R. 971-2). The rinse test is made of samples taken at various intervals approximately one month apart (R. 972). Thus, although the making of rinse tests is a standard method of supervision, this method alone is not deemed sufficient. The fact that only 1400 bottles are tested per year in Chicago does not show inadequate supervision because this is only one of the control devices used. In the regulation of milk all possible precautions are taken. Bacterial counts are not considered enough.

Similarly bacterial counts of paper containers are not considered enough. Tests should be coupled with inspection of every possible aspect of the manufacture of the container. The respondent's witness Dr. Sanborn wrote:

> "Bacteriological counts obtained thus far on various grades of paper are, however, only preliminary in that they do not adequately reveal the influence of changing mill conditions throughout the year" (R. 1513). "Without intimate knowledge and control of boards used, results of rinse tests may be inconsistent and misleading" (R. 1543).

So is explained his testimony that a disintegration test of the respondent's container gives an index of its sanitary condition (R. 266-7, 301). It may be that respondent's container was manufactured in a sanitary manner at the time of the trial. The evidence shows that it is made of virgin spruce pulp, that the water at the mill is chlorinated (the necessity for this is shown by the fact that the water contains coli bacteria, R. 513), that the paper is carefully

wrapped, that nontoxic adhesives are used, that the employees at the converting plant are examined medically, that sanitary precautions are taken during the various steps in manufacture, etc. Will the makers of this container continue these precautions and do the makers of other containers observe these precautions? This can be determined only by inspection. Periodical tests alone (even assuming that the disintegration test is as effective for paper containers as the rinse test is for glass) are no more sufficient in the case of a paper container than the rinse test in the case of glass. Inspections of the paper manufacturing operations are just as necessary as inspections of bottling equipment, the content of the alkali solution, etc.

Also, if it is assumed that paraffining has *some* bactericidal effect, the paraffining process should be inspected. Unlike respondent's container, there are types of paper containers that are not paraffined at the dairy (R. 906). Where this process takes place is not shown by the record. The paraffining process cannot be inspected and controlled by Chicago's health officers in the case of paper containers paraffined at far-distant places.

The petitioner's position on this point is completely supported by the case of *McKenna* v. *City of Galveston*, 113 S. W. 2d 606 (Court of Civil Appeals of Texas, 1938).

The plaintiff in that case sought to enjoin the enforcement of an ordinance requiring that ice cream be pasteurized and frozen upon the same premises in the city. The plaintiff bought ice cream mix in Houston where it was pasteurized, transported it to Galveston in refrigerated trucks, and used it there in the manufacture of ice cream. The plaintiff called numerous expert witnesses and the defendant city apparently called none. The trial court entered judgment

for the city and this was affirmed on appeal. There was much in the testimony about the necessity of inspection, including the following (p. 609):

> "'"• • • Pasteurization is the only method of ridding milk and milk-products from pathogenic germs that has come into general practice. As to what practical means there are for a health officer to determine whether or not milk has been properly pasteurized, the only method that can be employed for that purpose is by inspections of the apparatus used, the persons handling the milk, and the process employed at the particular plant where the pasteurization is done. • • •"'
>
> "'Dr. Stephenson testified: "Bacteria-count doesn't show whether or not the bacteria contain pathogenic-germs. As a practical matter, it is necessary in addition to taking proper samples and making bacteria-counts with reference to milk-products to take measures to see that milk is handled under proper sanitary conditions. It would not be safe simply as a health-measure to take samples of bacteria without taking other measures relating to the premises where the milk is produced, the manner, the utensils used, and the persons handling it. So, an inspection of the premises is a matter of considerable importance in insuring a safe milk supply."'
>
> "'"• • • Bacteria-count will not necessarily disclose the presence or absence of pathogenic-germs. Witness wouldn't say that it would be safe to rely upon bacteria-count, without some knowledge of the premises and handling of the product. The bacteria-count would have to be supplemented by inspection of the premises upon which the milk was produced."' '"

The court adopted in its opinion the following language from the city's brief (p. 610):

> "'• • • While some of the expert witnesses expressed the opinion that there would be no danger to the health of the city's inhabitants from ice cream frozen and pasteurized in Houston and brought to Galveston, those opinions in each instance were given

upon the assumption that the requisite care was to be taken in the pasteurizing, transporting, and handling of the product. They all agreed that each time it was handled an additional risk arose. The evidence makes clear that all possible safeguards taken in the pasteurization and handling of the ice cream mix at Houston and in its transportation to Galveston could possibly be set at naught by the manner in which it was handled by appellant after he received it. The evidence likewise makes it clear, and all the expert witnesses agree, that any practical measures relative to safeguarding milk and ice cream from infectious bacteria should include proper inspections of the premises where it is produced, handled, and pasteurized, and of all persons engaged in handling it. To make that practicable for the appellee city's health department to do, and to insure that the effects of pasteurization should not be endangered by unrestricted handling of the products after it is pasteurized, is what the ordinance plainly is designed to accomplish.'

"'That being true, it would clearly seem that the ordinance is not one of which there is a clear want of need, or that its unreasonableness so clearly appears that it can by the court be declared an arbitrary measure evidencing an abuse of discretion on the part of the governing body of the city.' "

A similar case is *Gilchrist Drug Co.* v. *City of Birmingham*, 234 Ala. 204, 174 So. 609 (1937). There the plaintiff, the operator of a drug store, sought to enjoin an ordinance requiring the manufacture of ice cream by the "pasteurized continuous flow method." The plaintiff used a new device, called a "counter freezer," for which he bought ice cream mix from Kentucky in large sealed cans; the mix was used in the counter freezer as needed. By the method required by the ordinance the mix was made in Birmingham and was required to flow immediately into the freezing apparatus after pasteurization. The mix used by the plaintiff was pasteurized in Kentucky when made, but was not pasteurized again by him. The trial court dismissed the com-

plaint and this was affirmed on appeal. The opinion (p. 610) noted that the counter freezer method for the manufacture of ice cream was a modern invention introduced into the state four or five years before. A large number were being operated in the state. The opinion noted at the same page that the ordinance in question was adopted before the counter freezer method was introduced and bears no relation to it. Of the desirability of preventive health measures, the opinion said (p. 612):

> "Rapid advance has been made in the science of medicine and, in the field of bacteriology. That the health and welfare of the people have been greatly advanced by the conscientious and intelligent labor of the scientists and members of the medical profession cannot now be open to question. Their labors are not to be restricted to curing disease and alleviating suffering, however important these may be, but the greater benefits are to be realized by the use of preventive means in anticipation of the danger of an epidemic. And it is fully as important that the health authorities should anticipate danger to public health, and provide against them, as it is to take steps to eradicate conditions after the disease has appeared."

The respondents do not contend that the methods of controlling glass containers are perfect, or that paper containers may be prohibited merely because possible methods of control fall short of perfection. The point is that the basic and essential public health techniques used in controlling glass containers cannot be applied with equal effectiveness and practicability to paper containers. Not only are the methods of testing, inspecting, and regulating different with the two containers, but the possible extent of supervision differs in that the glass container can be controlled locally while the paper container can be controlled only by making trips to distant places.

These differences in methods of control, although here they clearly justify (and indeed seem to require) the prohibition of paper containers, are in any event matters for the discretion of the legislative body. *South Carolina State Highway Department* v. *Barnwell Bros.*, 303 U. S. 177 (1936). And the case often cited by the petitioners, *Koy* v. *City of Chicago*, 263 Ill. 122 (1914), is closely applicable on this point. In that case, the ordinance required that a recording device should be attached to milk pasteurizers and that the records kept by the device should be under lock and key in the control of the commissioner of health. The plaintiff attacked the device required as impracticable and subject to manipulation by dealers and argued that the method of inspection required was not effective. After noting these contentions of the plaintiff, the opinion of the Illinois Supreme Court continued (p. 133):

> "These are questions of judgment and discretion, the determination of which must be left to the legislative department. If the apparatus should not record the temperature accurately at all times or should not indicate the length of time the temperature was maintained, or if it can be manipulated so as not to show an accurate record, these are matters for the city council to consider. *Courts cannot overrule the determination by the city council that a particular method of protecting the public health should be adopted unless it is so clearly and manifestly wrong that there can be no doubt about it.* A personal inspection of all milk sold in the city would be manifestly a requirement difficult, if not impossible, to carry out. Even though the recording apparatus may be manipulated by a dishonest dealer so as to show an untrue record, the city council may have thought its use better for the protection of the public than a system by which no record was preserved but the health officers were compelled to rely wholly upon the dealer, and we cannot say that they were clearly and unmistakably wrong. * * *" (Italics added.)

It is not unreasonable to require the use of a container whose sanitary condition may be controlled effectively by supervision at the dairy when it is filled with milk as opposed to a container which requires constant inspection of manufacture and processing in remote areas to insure effective sanitary control.

6. Paper containers are not transparent and cream does not rise to the top in them.

There are several public health aspects to the use of transparent containers. The purchaser can of course see that there are no dirty particles in the milk. But there is a more important health problem. The Chicago ordinance requires milk to have a certain butter-fat content. (See sec. 3082(A) for definition of milk, requiring milk to contain not less than 3¼% of milk-fat and sec. 3082(B) indicating that milk-fat and butter-fat are the same thing, R. 26) The requirement of a minimum butter-fat content is a health regulation, for the food value of milk depends on the proper amount of butter-fat. (See "public health reasons" under definition of milk, R. 26.) The cream line in a transparent bottle tells every purchaser its butter-fat content and every purchaser is in a sense an inspector. With this factor absent in paper containers, the city health officials will be required to make more extensive tests of the butter-fat content of the milk than they are required to do with glass containers. This factor alone would seem, under the decision in *Pacific States Box and Basket Co.* v. *White,* 296 U. S. 176 (1935), to be a sufficient justification for the exclusion of the non-transparent container. In the paper container the butter-fat content of the milk can be determined only by a "Babcock test" or by chemical analysis (R. 503-4, Tracy).

Not only is the cream line not visible in a paper container; in addition, milk in paper containers undergoes some unexplained process—chemical, physical or electrical—which so affects the milk that the cream is prevented from rising to the top of the container as it normally does in containers other than paper (R. 503-4). None of the respondent's witnesses advanced any explanation for this alteration of one of the normal characteristics of milk caused by paper containers. This strange phenomenon is alone a ground for caution in the use of a container for an easily-contaminated liquid that is a staple item in the diet of infants. This unknown factor *may* present a health problem in view of the absence of any evidence of the reason for it. The matter is thus within the discretion of the legislative body.

Koy v *City of Chicago*, 263 Ill. 122 (1914), indicates that these characteristics of paper milk containers justify their prohibition. As said in the opinion in that case (p. 131):

> "Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness, and freedom from disease shall be secured and made to appear."

So the master found (R. 1730):

> "It may well be a legislative matter whether milk shall be sold in standard transparent glass milk bottles rather than in paper containers in order to protect the public health and to guarantee that milk sold contains the usual amount of cream."

The City of Chicago has the right to require the use of a milk container that is transparent and that does not interfere with the ordinary physical characteristics of milk.

(c) Factors relied on by the District Court and in the majority opinion of the Circuit Court of Appeals are not controlling.

The opinion of the trial court and the majority opinion of the Circuit Court of Appeals both indicated that their authors believed that other factors in the case outweighed the evidence discussed above showing possible health hazards in the use of paper milk containers. A consideration of these other factors shows that they are not controlling here.

Weakness of presumption that ordinance is valid.

The cases cited above show in clear language that whoever attacks the validity of legislation has the burden of establishing its validity and that there is a strong presumption that legislation enacted under the police power is valid. The majority opinion of the Circuit Court of Appeals says that here the presumption "could be little more than a shadow" since the use of paper milk containers was in its incipient stage when the ordinance was enacted in 1935 so that the legislative body "could not, from the nature of things, have considered and weighed their advantages and disadvantages" (R. 1794). We submit that this ruling is not sound constitutional law.

The petitioners have never taken the position in this case that the reasonableness of the ordinance must be determined as of the time of its passage in 1935, for it is admitted that a law valid when passed may become invalid thereafter by reason of a change of conditions. This

is pointed out in the opinion of the Circuit Court of Appeals (R. 1789). But certainly this does not mean that there is no presumption of the validity of legislation that is attacked on the ground that it became unreasonable after its enactment. Since the question of reasonableness is determined in the light of conditions exisiting today, we are not concerned here with what the City Council actually did consider before it enacted the ordinance, but with what it might reasonably have considered assuming conditions to have been as they are today or, rather, with what it might reasonably consider today in the light of today's conditions. For this reason the presumption of validity is just as strong as if the ordinance had been passed today or as if today's conditions existed when the ordinance was passed.

The holding of the Circuit Court of Appeals would give courts a much greater latitude in invalidating legislation which affects conditions that come into existence after its enactment. The presumption of validity arises upon the enactment of the legislation. Obviously the strength of the presumption is not impaired by advancing age.

Use of paper milk containers elsewhere.

There is much evidence in the record about the use of paper containers for distributing milk in municipalities other than Chicago. The trial judge in his opinion placed much reliance on this evidence, as well as on the absence of evidence tracing "serious disease or minor ailment" to the use of paper containers (R. 1753). Likewise the majority opinion of the Circuit Court of Appeals emphasized that the use of paper containers "has been authorized and permitted by more than 200 cities and villages in the United States, including such cities as Washington, D. C.,

New York and Philadelphia, as well as practically all of the cities and villages near and adjacent to the City of Chicago" (R. 1794).

These factors have no bearing on the validity of the Chicago ordinance under the cases cited above. At the hearing before the master the petitioners objected (R. 148) to the introduction of evidence of the use of paper milk containers in other municipalities if this evidence was to be considered on the question of the reasonableness of the ordinance. Obviously the use of the containers elsewhere has no factual bearing on the case unless accompanied by evidence that municipalities not prohibiting them considered carefully the public health hazards involved. As shown below, the slight evidence in the record about the precautions taken in a few municipalities shows that the precautions were very inadequate.

The question of the reasonableness of the ordinance must be determined by the evidence about the sanitary qualities of the paper container and not by a roll call that arrays on one side the municipalities not prohibiting its use and on the other side the municipalities prohibiting its use. Evidence of permission in one municipality or state cannot affect the validity of a prohibition in another municipality or state. The fact, for example, that Chicago may permit automobiles bearing loud speakers to tour the streets would afford no basis for an attack upon an ordinance of New York City prohibiting the use of those devices in congested areas. So the fact that other states did not limit the weight of motor trucks using their highways would not affect the validity of the Texas statute prescribing limitations of weight, *Sproles* v. *Binford*, 286 U. S. 374 (1931). The fact that Illinois has not seen fit to require compulsory vaccination could not affect the validity

of a Massachusetts statute requiring compulsory vaccination, *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1904). Oregon's regulations concerning fruit containers are not invalid because they prohibit the use of containers permitted elsewhere, *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176 (1935). Instances could readily be multiplied.

Also, the ordinance may not be held unreasonable because no instance of contagion or death resulting from the use of paper containers has been proved by the petitioners. The exercise of police power for the protection of the public health is not conditioned upon the prior occurrence of disease and death. A future hazard is as strong a justification for the exercise of the power as is a prior disaster. An antecedent outbreak of amoebic dysentery, for example, is not an essential condition to the exercise of the city's power to eliminate sources of danger in plumbing systems. So, here, the city's power to protect itself from hazards to public health which it believes are inherent in the use of respondent's containers exists regardless of whether or not their use elsewhere has resulted in disaster. The respondent's witness, Packer, testified in his deposition that it was impossible to trace cases of contagion to a single-service container (R. 1374-5). As a result the lack of evidence of specific cases of illness attributable to the use of these containers is in fact of no significance.

From the testimony of the respondent's witness, Packer, it is also apparent that the consumers of milk have been used in many municipalities as experimental media for the determination of the sanitary quality of paper containers. Packer testified in substance (R. 1368-9) that regulations governing the handling of paper containers are necessary; that no regulations exist in the City of Philadelphia, although regulations were being formulated at the time of

the taking of his deposition (1939). He further testified that regulations were as necessary in 1929 when the use of paper containers was first permitted in Philadelphia as they are now, but that regulations were not then formulated because nobody knew what the regulations ought to be—"somebody had to pioneer" (R. 1370).

The principal witness for the respondent, Dr. John R. Sanborn, testified that in his opinion, in the interest of public health, standards should be formulated and adopted by public health authorities governing the production of paper board for use in paper milk containers and governing also the subsequent processing and handling of the paper board until the container is filled with milk. He further testified that he had attempted to ascertain what cities had adopted regulations with respect to paper containers and that so far as he knew no cities other than Baltimore, Maryland and Reading, Pennsylvania had adopted any regulations. In his opinion neither the Baltimore nor the Reading regulations were satisfactory (R. 244-7).

In this state of the record the fact that paper containers are used for the distribution of milk in some municipalities other than Chicago proves nothing with respect to the unreasonableness of prohibiting paper milk containers in Chicago.

Reliance upon experience elsewhere was rejected in *Standard Oil Company* v. *City of Marysville*, 279 U. S. 582 (1928), which involved an ordinance requiring the storage of gasoline below ground. The court said (p. 586):

> "The facts that the tanks of petitioners within the city limits have been operated successfully above ground; that appliances used by them are of the best type; that fires in connection with their many tanks located elsewhere have been relatively infrequent, and numerous others found by the master, were properly

for the consideration of the city council in determining whether the ordinance should be enacted, but they fall far short of withdrawing the subject from legislative determination or establishing that the decision made was arbitrary or unreasonable. * * *

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. * * *"

Regulation of paper milk containers by the State of Illinois.

Another factor noted by the majority opinion of the Circuit Court of Appeals is that "the legislature of the State of Illinois and its Department of Health have approved the use of such containers since 1939" (R. 1794). As we have pointed out in Point I of this brief, the State of Illinois in regulating paper containers used in distributing pasteurized milk provided expressly in the 1939 statute that cities could regulate further. Also, the recognition of the use of paper milk containers by the state is merely another instance of their use elsewhere. This factor, as we have just explained, is immaterial in fact and in law.

Regulation of paper milk containers in model ordinance of United States Public Health Service.

Another element emphasized by the majority opinion of the Circuit Court of Appeals is "the fact that the United States Public Health Service, whose model ordinance has been widely adopted by cities throughout the United States, including the City of Chicago, amended its ordinance in 1939, so as to include the regulation of single-service containers" (R. 1794).

We note briefly the facts involved. The United States Public Health Service, which performs advisory functions

only as to municipal milk regulations (R. 609), has prepared a model ordinance and code of regulations, both of which the City of Chicago follows substantially (R. 1065). While this case was pending before the master, section 10 of the Health Service's model ordinance was amended to provide that milk may be delivered in single-service containers (defendants' exhibit 17, R. 980, R. 1678-79). At the time when this amendment was made, the Health Service also added provisions to its model code of regulations providing for the regulation of single-service containers.

These regulations,* as we have noted above (p. 59), require public health officials to inspect the paper mills and converting or fabrication plants in which the various processes in the manufacture of paper milk containers take place. The regulations say that the inspections may be made "by the health officer or by any agency authorized by him." The paper mills and converting plants where paper containers are made are located in various parts of the country—e. g., at the time of the trial the paper in the respondent's container was made in the West Virginia mill of the Cherry River Paper Company (R. 164) and the paper was converted into the containers by another manufacturer at Middleton, Ohio (R. 198). The inspection of the manufacturing of the respondent's container would thus require Chicago health officials to travel to West Virginia and Ohio; and there are other types of

* The Model Code of Regulations of the United States Public Health Service also contained a statement about the characteristics of paper milk containers which shows that their prohibition is not unreasonable:

> "The porous condition of paraffined containers now available and the sloughing off of particles of paraffin into the product are undesirable, and manufacturers of single-service containers are urged to make every effort to provide a non-absorbent non-flaking surface" (plaintiff's exhibit 61, R. 1591).

containers for which the paper is made and fabricated in many other states (see map, R. 1479). Also there is no "agency authorized" by health officers to inspect paper mills and fabrication plants (Prucha, R. 1734).

In contrast with the expensive devices suggested by the regulations of the Health Service for the supervision of paper milk containers, the sanitary quality of the glass containers which the Chicago ordinance requires may be supervised locally. Since the glass container can be effectively sterilized at the dairy when it is being filled with milk (Sanborn, R. 169), there is no need to inspect any aspect of the glass container before the cleaning process at the dairy. Not only are glass containers absolutely sterile when manufactured (R. 169), they receive bactericidal treatment before each use and with the best method of sterilization it is possible to obtain a sterile glass bottle "according to bacteriological tests" (R. 170). The bactericidal treatment at the local dairy can be thoroughly inspected and controlled locally. In Chicago this control consists of regular inspections of the cleaning process, including the operation of the washing equipment, the temperatures of the solutions used, the bottling equipment, etc. (R. 970-72). Also occasional tests are made locally of the bacterial content of sample bottles (R. 972).

Instead of permitting the use of paper milk containers, the proper regulation of which requires inspection of manufacturing processes at far-distant places, the Chicago City Council requires the use of glass containers which may be (and are) inspected locally. This is not an unreasonable legislative determination, even though the model ordinance of the United States Public Health Service permits both glass and paper milk containers.

Use of paper containers for other purposes.

In holding that the ordinance was void if it forbade the use of paper milk containers, the trial judge placed great reliance on evidence about other uses of paper containers in Chicago (opinion, R. 1752). Of one type of container, the opinion states that it is less meritorious in structure and design than respondent's and is in daily use in Chicago for the sale of milk, chocolate milk, ice cream, and other liquids by drug stores, hotels, restaurants, and soda fountains.* The other type, the opinion says, is in common use for cheese, butter, meat, drinks, and other edibles.

The record shows that the use of paper containers for purposes other than the delivery of fresh milk does not make the prohibition of the use of paper milk containers unreasonable or discriminatory. The petitioners introduced evidence showing that the characteristics of the other commodities sold in paper containers are such that from a public health point of view they are in nowise comparable to milk (R. 1094-95, R. 1171-73). This fact is also established in the record by the statement of the respondent's leading witness, Dr. John R. Sanborn:

> ". . . *milk is the most perishable and easily contaminated food that is placed in paper containers* . . ." (R. 1495).

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*The trial court did not point out that the sale in paper containers of such of these commodities as are milk products is forbidden by the Chicago Board of Health. The only evidence of the sale of milk in paper containers was testimony that attorneys employed by the respondent went to several drug stores and restaurants in Chicago and purchased milk in paper tumblers (R. 857-62, 891, 897). The clerks in these stores were violating a regulation of the Board of Health providing, "All milk and milk products shall be sold, served, or dispensed to the final consumer only in unopened, original containers as received from the distributor" (defendants' exhibit 26, R. 1697). Obviously a violation of this regulation does not show that there are no health hazards in the use of paper milk containers. The master so indicated in his report (R. 1731).

Proposal by Chicago Board of Health that City Council permit use of paper milk containers.

The majority opinion of the Circuit Court of Appeals emphasizes the fact that the Chicago Board of Health recommended to the Chicago City Council that the ordinance be changed in accordance with the amendment to the model ordinance of the United States Public Health Service. The proposal was made on October 16, 1939 while this case was being heard by the master. In making its recommendation for the change in the ordinance, the Chicago Board of Health also recommended that the regulations of the United States Public Health Service be adopted (R. 1698-99). As we have noted, the regulations of the Health Service require health officials to inspect paper milk containers while in the process of manufacture and this inspection must be made in far-distant places. Clearly it is not unreasonable on the part of the Chicago City Council to disregard the recommendation of the Board of Health that paper milk containers be permitted when the regulation of the recommended containers would require local health officers to make expensive inspection trips to the paper mills and converting plants.

* * * * * *

We submit that the factors considered by the trial court and the majority of the judges of the Circuit Court of Appeals to prove the ordinance to be unreasonable are not determinative of the question of the validity of the ordinance under the fourteenth ammendment. Unless the wisdom and propriety of the ordinance are to be determined by the courts, the controlling factor is what was admitted in the majority opinion of the Circuit Court of Appeals: "the record discloses some evidence . . . that the use of such containers presents a hazard to health" (R. 1794).

The prohibition of the use of paper milk containers may be held unreasonable only if it is "so unrelated in any way to any possible danger to public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizens" [*People* v. *Quality Provision Co.*, 367 Ill. 610, 614 (1938), quoting from Mr. Justice Hughes in *Price* v. *Illinois*, 238 U. S. 446, 451-452 (1915)]. The evidence shows that the ordinance is not unreasonable. The holding of the trial court and the pronouncement of the Circuit Court of Appeals that the ordinance is unreasonable were based on an erroneous conception of the applicable principles of constitutional law.

CONCLUSION.

The petitioners respectfully urge this court to reverse the judgment of the Circuit Court of Appeals.

CITY OF CHICAGO, *a Municipal Corporation*,
BOARD OF HEALTH OF THE CITY OF CHICAGO,
DR. ROBERT A. BLACK, *Health Commissioner and Acting President of Board of Health of the City of Chicago*,

Petitioners,

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APPENDIX A.

ILLINOIS MILK PASTEURIZATION PLANT LAW.

Enacted by the 61st General Assembly,

Approved July 24, 1939.

(Laws of Illinois, 1939, pp. 660-666; Ill. Rev. Stat., 1941, Chap. 56½, Secs. 115-134.)

AN ACT *regulating the handling, processing, labeling, sale and distribution of pasteurized milk and pasteurized milk products.*

SECTION 1. The words and phrases herein defined are used in the sense given them in the following definitions:

(a) The terms "pasteurization," "pasteurized" and similar terms shall be taken to refer to (1) the process of heating every particle of milk or milk products to at least 143° F., and holding at such temperature for at least 30 minutes; or (2) heating every particle of milk to at least 160° F., and holding at such temperature for at least 15 seconds; either method shall be carried out in apparatus approved by the Department and properly operated; provided that nothing in this definition shall be considered as disbarring any other process which has been demonstrated to be equally efficient and is approved by the Department.

(b) "Department" means the State Department of Public Health.

(c) "Director" means the Director of the Department of Public Health.

(d) "Person" includes an individual, aggregation of individuals, corporation, association and partnership.

(e) "Certificate of Approval" or "Certificate" means a document awarded to the owner or operator of a pasteurization plant for compliance with the provisions of and under conditions set forth in this Act.

(f). "Pasteurized Milk Products" means and includes pasteurized cream, Vitamin "D" milk, soft curd milk,

homogenized milk, skimmed milk, buttermilk and milk beverages as defined in this Act.

1. Pasteurized cream is a portion of milk which contains not less than eighteen per cent milk fat.

2. Pasteurized Vitamin D milk is milk the Vitamin D content of which has been increased by a method and in an amount approved by the Director.

3. Pasteurized soft curd milk is milk the curd tension of which is comparable to human milk when tested by and in a manner approved by the Director.

4. Pasteurized homogenized milk is milk that has been mechanically treated in such manner as to alter its physical properties with particular reference to the condition and appearance of the fat globules, to such an extent that no visible cream separation occurs after 48 hours storage and fat tests of the milk at the top and bottom of a quart bottle do not show a difference in fat percentage exceeding two-tenths of one per cent (0.2%).

5. Pasteurized skimmed milk is milk from which a sufficient portion of milk fat has been removed to reduce its milk fat percentage to less than three per cent.

6. Buttermilk is the product resulting from the churning of pasteurized milk or cream, or from the souring or treatment by a lactic acid or other culture of milk, skimmed milk or reconstituted milk. It contains not less than eight per cent of milk solids-not-fat.

7. Pasteurized milk beverages shall mean a food compound consisting of milk, skimmed milk, cream or buttermilk as the case may be, to which has been added a syrup or flavor consisting of wholesome ingredients.

(g) "Pasteurization Plant" as used herein shall be taken to include the building, machinery, apparatus, and other equipment and appurtenances necessary and essential in the work of pasteurizing milk or milk products, tanks and other equipment essential to the storing or handling of the milk being held for pasteurization, the equipment, machinery, apparatus, and appurtenances for cooling the milk and milk products, and placing the milk and milk products in bottles or other suitable containers, and storing such bottles and containers following pasteurization.

(h) "Minimum Requirements" means the code formulated by the Director for interpretation and enforcement of this Act.

SECTION 2. Any person operating a pasteurization plant who distributes, delivers or sells pasteurized milk or pasteurized milk products for consumption in the State of Illinois shall annually make application to the Department for a Certificate of Approval.

SECTION 3. Any person who shall hereafter engage in operating a pasteurization plant for the purpose of distributing, delivering, or selling pasteurized milk or pasteurized milk products for consumption in the State of Illinois, shall before engaging in such business make application to the Department for a Certificate of Approval.

SECTION 4. Upon receipt of such application, the Department shall make an inspection of said pasteurization plant and in the event that the plant, equipment and methods of operation are found to comply with the provisions of this Act, the Director shall issue a Certificate of Approval upon payment of the required fee as herein provided.

SECTION 5. Any person contemplating the construction or remodeling of a pasteurization plant for which a Certificate of Approval is required by this Act shall submit plans, specifications and information relative thereto to the Department for review. The Director shall review such plans, specifications and information and shall advise in writing whether or not such proposed construction or remodeling complies with the requirements of this Act.

SECTION 6. Any person, operating a pasteurization plant or having made application for a Certificate of Approval for the operation of a pasteurization plant shall at any time allow the Department to inspect such plant and to take such samples as may be deemed necessary by said Department.

SECTION 7. All bottles, cans, packages and other containers enclosing milk or any milk product defined in this Act shall be plainly labeled or marked with (a) the name of the contents as given in the definitions in this Act; (b) the word "pasteurized" only in the event the contents have been pasteurized or heated within the scope of this Act; (c) the name and post office address of the plant in which the contents were pasteurized.

SECTION 8. All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized. It shall be unlawful for hotels, soda fountains, restaurants, grocery stores, milk depots, milk stations and similar establishments to sell or serve any pasteurized milk or milk products except in the original container in which it was placed at the point of pasteurization, provided that this requirement shall not apply to milk or milk products consumed on the premises which may be served from the original container or from a dispenser approved by the Department for such service. The sale or distribution of bulk, loose or dipped pasteurized milk or milk which has been heated within the purview of this Act is hereby prohibited.

SECTION 9. Any person selling, delivering or distributing milk or milk products in the State of Illinois who shall heat milk or milk products or subject milk or milk products to other treatment in an effort to make the milk or milk products safe for human consumption or to preserve its keeping qualities shall comply with the provisions of this Act.

SECTION 10. No person shall sell, deliver or distribute any milk or milk products which have been heated or subjected to any other treatment in an effort to make the milk or milk products safe for human consumption or to preserve its keeping qualities unless such milk or milk products have been heated or treated in compliance with the provisions of this Act.

SECTION 11. No milk or milk products sold, distributed or delivered in this State shall be heated or subjected to any other treatment in an effort to make it safe for human consumption or to preserve its keeping qualities unless such milk or milk products are processed in compliance with the provisions of this Act.

SECTION 12. No person selling, delivering or distributing milk or milk products shall sell or offer for sale milk or milk products with any word or words stating or indicating that the milk or milk products are pasteurized nor shall they indicate by any other means that the milk or milk products were pasteurized, until the Department has issued a Certificate of Approval for the pasteurization plant in which the milk or milk products were pasteurized.

SECTION 13. The sale or distribution of milk from a plant, the Certificate of Approval of which has been revoked is hereby prohibited.

SECTION 14. The Certificate of Approval fee shall be ten dollars ($10.00). Unless suspended or revoked by the Department, a certificate shall be good until January first of the year following the date of its issue, and subject to annual renewal upon payment of renewal fee of ten dollars ($10.00). Such renewal being subject to approval on reinspection or on information submitted by the owner or operator of a plant in answer to questions sent to the owner or operator by the Department, or both.

SECTION 15. Any pasteurization plant coming under the provisions of this Act shall conform with all of the following items of construction, equipment, maintenance and operation and in accordance with minimum requirements adopted by the Director for interpretation and enforcement of this Act.

ITEM 1. The floors of all rooms in which milk or milk products are handled or stored shall be constructed of concrete or other equally inpervious and easily cleaned material and shall be smooth, properly drained, provided with trapped drains, and kept clean.

ITEM 2. Walls and ceilings of rooms in which milk or milk products are handled or stored shall have a smooth, washable, light-colored surface and be kept clean. Ceilings shall have a minimum height of ten (10) feet.

ITEM 3. All openings into the outer air shall be effectively screened to prevent the access of flies. Doors shall be self-closing.

ITEM 4. All rooms shall be well lighted and ventilated.

ITEM 5. The various milk-plant operations shall be so located and conducted as to prevent any contamination of the milk or of the cleaned equipment. Pasteurized milk or pasteurized milk products shall not be permitted to come in contact with equipment with which unpasteurized milk or milk products have been in contact.

ITEM 6. Every milk plant shall be provided with toilet facilities. There shall be at least one room or vestibule not used for milk purposes between the toilet room and any

room in which milk or milk products, equipment of containers are handled or stored.

ITEM 7. The water supply shall be easily accessible, adequate and of a safe, sanitary quality.

ITEM 8. Convenient hand-washing facilities shall be provided, including warm running water, soap and sanitary towels.

ITEM 9. Only "sanitary milk piping" of a type which can be easily cleaned with a brush shall be used.

ITEM 10. All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. Single service containers, caps, gaskets and similar articles shall be manufactured and transported in a sanitary manner.

ITEM 11. All wastes shall be disposed of in conformity with the requirements of the Department.

ITEM 12. All milk and milk products containers and equipment shall be thoroughly cleaned after each usage. All multi-use containers shall be subjected to an approved bactericidal process after each cleaning and all equipment immediately before each usage. When empty and before being returned to a producer by a milk plant, each container shall be effectively cleaned and subjected to bactericidal treatment.

ITEM 13. After bactericidal treatment, all bottles, cans, and other milk or milk products containers shall be stored in such manner as to be protected from contamination.

ITEM 14. Between bactericidal treatment and usage, containers and apparatus shall not be handled in such manner as to permit any part of the person or clothing to come in contact with any surface with which milk or milk products come in contact.

ITEM 15. Milk bottle caps and parchment paper for milk cans shall be purchased and stored only in sanitary tubes and cartons respectively, and shall be kept therein until used.

ITEM 16. Pasteurization shall be performed as described in Section 1 of this Act. All pasteurizers shall be equipped with such temperature indicating and recording instru-

ments and such accessory equipment as may be specified in the minimum requirements.

ITEM 17. All milk received for pasteurization but not pasteurized within two hours after it is received at the plant shall then be immediately cooled in equipment approved by the Department to a temperature of 50° F., or less, and maintained thereat until pasteurized; and all pasteurized milk and milk products shall be immediately cooled to an average temperature of 50°F., or less and maintained thereat until delivery.

ITEM 18. Bottling or packaging of milk and milk products shall be done at the place of pasteurization by approved mechanical equipment.

ITEM 19. Overflow milk or milk products shall not be sold for human consumption.

ITEM 20. Capping of milk and milk products shall be done by automatic machinery approved by the Department. Hand capping is prohibited.

ITEM 21. Every person connected with a pasteurization plant whose work brings him in contact with the production, handling, storage, or transportation of milk, milk products, containers or equipment, shall furnish such information, permit such physical examinations, and submit such laboratory specimens as the Department may require for the purpose of determining freedom from infection.

ITEM 22. All persons coming in contact with milk, milk products, containers, or equipment shall wear clean outer garments and shall keep their hands clean at all times while thus engaged.

ITEM 23. All vehicles used for the transportation of pasteurized milk or milk products shall be so constructed and operated as to protect the milk or milk products from the sun and from contamination. Such vehicles shall be kept clean. The immediate surroundings of the milk plant shall be kept in a neat, clean, condition.

SECTION 16. The Department may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any Certificate of Approval because of the violation of any of the provisions of this Act or for any of the following causes:

(a) Insanitary conditions of plant surroundings within the control of the plant management, insanitary methods

of handling milk, milk products or milk containers or equipment.

(b) Employment of careless, indifferent and inefficient personnel.

(c) Violation of any of the provisions of this Act or of the minimum requirements for interpretation and enforcement of the Act.

(d) Failure to display Certificate of Approval to the public at all times when such Certificate of Approval has been issued as provided in this Act.

(e) Displaying to the public any Certificate of Approval which has been suspended or revoked or which has expired.

The Department shall, before refusing to issue, suspending or revoking any Certificate, at least ten (10) days prior to date set for hearing, notify in writing the applicant or holder of such certificate of any charges made and shall afford such accused person an opportunity to be heard in person or by counsel in reference thereto. Such written notice may be served by delivery of the same personally to the accused person, or by registered mail to the place of business of the accused last theretofore known to the Department. At the time and place fixed in the notice, the Department shall proceed to hearing of the charges and the accused shall be accorded ample opportunity to present in person or by counsel, such statements, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto.

At any time after suspension or revocation of any Certificate, the Department may restore it to the accused if the Department is satisfied that the accused will comply with the provisions of the Act.

SECTION 17. Any order or decision made, issued or executed by the director in connection with the refusal to issue or renew, suspension or revocation of a Certificate of Approval whereby any person or company deems himself or it to be aggrieved, shall be subject to review by the Circuit Court of Sangamon County. A petition for the review of the action of the Director objected to by such person or company shall be filed within thirty (30) days from the date of the service of a copy of the order or decision made by the Director upon such person or company. A copy of such petition for review as filed with and certi-

fied to by the clerk of such court shall be served upon the director within five (5) days after filing thereof. If such petition for review is not filed within said thirty (30) days the parties aggrieved shall be deemed to have waived the right to have the order or decision reviewed.

The Director shall within ten (10) days, unless the time be extended by order of court, after the service of the copy of the petition for review upon him, prepare and file with the clerk of said court a complete transcript of the record of the hearing, if any had before him, and a true copy of the order or decision, and certify to the same. The order or decision of the director shall be deemed *prima facie* to be correct and the cause shall be heard by the court as a civil case upon such transcript of the record. Merely technical irregularities in the procedure of the Director shall be disregarded and the burden of proof of questions in controversy shall rest upon the petitioner.

The said court shall have jurisdiction to affirm or set aside the order or decision of the director and to restrain the enforcement thereof.

Appeals from all final orders and judgments entered by the said court in reviewing the order and decision of Director may be taken by any party to the action as in other civil cases.

The commencement of proceedings to review the action of the Director under the provisions of this section shall not act as a stay of the Director's order or decision unless so ordered by the court upon due notice to the director.

SECTION 18. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than one hundred dollars ($100.00) for each day such violation continues or imprisonment in the county jail for not more than one year or both such fine and imprisonment.

SECTION 19. Nothing in this Act shall impair or abridge the power of any city, village or incorporated town to regulate the handling, processing, labeling, sale or distribution of pasteurized milk and pasteurized milk products, provided that such regulation not permit any person to violate any of the provisions of this Act.

SECTION 20. The Act entitled "An Act in relation to the pasteurization of milk", approved June 30, 1925, as amended June 29, 1935, is hereby repealed.

APPENDIX B.

Glossary of Technical Terms Frequently Used in Record.

B-coli, coli bacteria, see *coli*.

B-prodigiosus, prodigiosus bacteria, see *prodigiosus*.

broke, paper that has broken in manufacture at the mill and is put through the process again (R. 202, 7; 1068).

calender, the machine in a paper mill in which the paper is sprinkled with water and ironed to give it a smooth finish (R. 744, 1073).

chip, mixed waste papers from which paper is made (R. 202, 1069).

chloramine (sometimes misspelled *chlorarine* in the record), a germicide made of chlorine and ammonia used in paper mills (R. 218).

coli, a type of intestinal bacteria indicating faecal contamination (R. 383, 715).

disintegration test, pieces of paper board are cut and placed in sterile water, the paper is then beaten by a disintegrating machine, such as the apparatus in the photograph, R. 1523, and the water with the pulp suspended in it is then tested for its bacterial content (R. 175, 1537); designed to disclose the presence of bacteria in the paper board (R. 266).

offset, an impression made on the back of a sheet of paper by the printing on the sheet piled on top (R. 344).

pathogenic bacteria, disease-producing bacteria (R. 182).

prime stock, pulp made directly from wood (R. 199).

prodigiosus, a type of bacteria used often in bacterial tests because they form red colonies and can be detected without much technical difficulty (R. 1202).

rinse test, sterile water is introduced into a container and the walls of the container are rinsed with the water; the rinse water is taken out and the bacteria

counted (R. 186); the standard method for testing glass milk bottles (R. 486); designed to disclose the presence of surface bacteria (R. 265).

secondary stock, pulp or paper that is not prime; sometimes used to mean waste papers (R. 201).

scoring, in a converting plant the process of denting the portions of the paper to be bent when the container is formed (R. 313).

slime spot, a spot on paper caused by slime in the water or machinery at a paper mill (R. 215-7).

spore (sometimes misspelled *spoor* in the record), a seed that becomes bacteria, a dormant stage of bacteria (R. 285, 740).

trim, the cuttings left over after the fabrication of a paper product (R. 202, 1069).

virgin stock or pulp, pulp that has not previously been used for commercial purposes (R. 207).

waste papers, paper collected from offices, homes, etc., to be re-used by a mill in making fresh paper (R. 200).

white water, water in a paper mill that has been through the process and is re-used (R. 219).

APPENDIX C.

Summary of Testimony of Expert Witnesses.

(Within the confines of this brief it is impossible to give a complete account of the testimony of the expert witnesses, to state every opinion expressed, and to explain every experiment testified to. The following brief resumé of the more important expert testimony is therefore in the nature of a guide to the record.)

John R. Sanborn of Geneva, New York (testimony R. 144-305), plaintiff's witness, is a bacteriologist; graduate of Massachusetts State College, Doctor of Science and Philosophy; teacher of bacteriology at McGill University (1924-1928); research bacteriologist for International Paper Company (1929-1933) and Arthur D. Little, Inc. (1934-1936) investigating paper containers and wrappers for food; since February, 1937, in charge of investigation of paper containers at New York State Experiment Station, Geneva, New York, in employ of Cornell University (R. 144-6)—the fund for the investigation having been started by paper container manufacturers, including the Ex-Cell-O Corporation, the manufacturer of the machine that forms and fills respondent's container (R. 224-225); author of numerous articles, of which a number appear in the record (plaintiff's exhibit 4, R. 1401-14; plaintiff's exhibits 16, 17, 49, 21, 22; defendants' exhibit 2).

Dr. Sanborn testified about various aspects of paper milk containers, including the operation of paper mills (R. 164-6), sanitary factors in paper manufacture (R. 198-221), and tests made by him on paper and glass containers. In his personal experience he knew of no disease spread by single-service milk containers (R. 153-4) and there is a

higher degree of sterility in the paper container than in the glass bottle (R. 171); he stated that it was possible to obtain a sterile glass bottle with the best method of sterilization (R. 170). In his opinion, the absorption of milk he had found in paper containers was not detrimental to health or to the consumers of milk (R. 289-90) and he had not heard any objection from health officials about the amount of absorption (R. 286). In his opinion the paraffin in paper containers is not detrimental to the milk (R. 178) or dangerous to health (R. 295), and the first purpose of paraffin is to prevent leakage and a secondary purpose to act as a sterilizing agent, for which it is not effective (R. 194). In his opinion city health authorities where paper milk containers are permitted should have some method of supervision of sanitary conditions in paper mills (R. 209). In his opinion a disintegration test on respondent's container would give an index of the sanitary condition of the board and the sterility of the container (R. 266-7), and as long as the mill making respondent's container goes on as it has or unless some emergency arises, inspection of the mill is not necessary (R. 301). In his opinion it is "very often true" that some effort in addition to the disintegration test is necessary (R. 301).

Harry C. Fisher of Cincinnati (testimony R. 306-359, 534-546), respondent's witness, is a chemist, graduate of the University of Cincinnati; chief chemist of Gardner-Richardson Company. He testified about the processes in converting paper sheets into paper blank containers for milk (R. 307-16, 327-29, 332-38, 534-40) and to disintegration tests made by him on paper board (plaintiff's exhibit 39, R. 319-25, 1561-2). On cross-examination, he described spots on defendants' physical exhibits 3 (R. 332-43) and 4, 5, and 6 (R. 344-47, 352-54) and on plaintiff's physical exhibit 40 (R. 346-7, all of which are unparaffined blank con-

tainer forms. He described little particles of fibres and slivers at the edges of the blanks (R. 340-41, 356). He tore a blank to show that the ink spots did not go below the surface of the paper board (R. 355).

John W. Rice of Lewisburg, Pennsylvania (testimony, R. 378-440), a witness called by the master (R. 378), is a professor of bacteriology at Bucknell University; received a doctor's degree from Columbia University; has done research work on paper containers since 1931 (R. 378-9). He testified about two series of tests made by him as reported in two articles, one in 1934 on glass and paper containers, and one in 1937 on paper containers (R. 383 ff., 398-411, 414-32). In his opinion the principal sources of bacterial contamination of paper milk containers are the pulp and the water used in paper manufacture (R. 380). In his opinion paper containers have been produced "which compare very favorably with sterile glass bottles as a sanitary receptacle for milk" (R. 388). In his opinion paper milk containers are superior to the glass container because there is no chance to spread infectious disease organisms from household to household by a single-service container (R. 424). As a bacteriologist he was not satisfied with the present development of paper or glass milk containers (R. 385-6). His 1937 studies indicated that the inner or milk-contact surfaces of some paper containers tested were 93.9 per cent sterile (R. 396). In his opinion, if the paper board is free from bacteria, there is no health problem presented in the absorption of milk in a paper container (R. 412). His 1937 studies showed bacterial odors in the paper containers tested (R. 416-19).

Paul H. Tracy of Urbana, Illinois (testimony, R. 471-533), respondent's witness, is Professor of Dairy Manufacture at University of Illinois, graduate of University of Illinois with degrees of B.S., M.S., Ph.D.; has done research

work and published many articles on dairy products; in February, 1937, started studies of paper milk containers with Dr. Prucha; has visited paper mills (R. 471-3), his expenses being paid by the mills (R. 525); has done special work for respondent (R. 525). Dr. Tracy's department operates a dairy for retail customers to make teaching more practical, using three types of paper containers as well as glass bottles (R. 473-4), the Pure-Pak machine used having been transported and lent by the Ex-Cell-O Corporation (R. 526). Dr. Tracy testified to many tests performed by him on many aspects of paper milk containers and glass milk bottles (R. 493-8; plaintiff's exhibit 44, R. 494, 1565). In his experience he had not traced any disease to paraffin particles in milk in paper containers (R. 503). In his opinion the condition of the paper mills is a significant factor in the sanitary condition of the paper container (R. 512). He would not consider the chipping of paraffin in the milk or the bulging of the paper container to present a health problem (R. 529-30), nor the absorption of milk in the wall of the container (R. 531).

Howard Orvis (testimony, R. 567-606) of Winnetka, Illinois, respondent's witness, had been health officer for the Township of New Trier for twelve years when he testified (R. 567, 572). He testified to bacterial counts taken by rinse tests on milk in Pure-Pak containers from one dairy and on milk in glass containers from another dairy. He felt that the control he had over paper containers was equal to the control over glass bottles (R. 569-73). He was never in a paper mill (R. 573), and in his ten months' experience with paper milk containers had no occasion to think that it was necessary to go to the paper mill to guard the public health of Winnetka (R. 605).

Martin J. Prucha of Urbana, Illinois (testimony, R. 624-671, 700-839), respondent's witness, is a Professor at Uni-

versity of Illinois; Ph.D., Cornell, 1913; since 1920 was chief in research in the Illinois Agricultural Experimental Station, has done work for the Chicago Board of Health (R. 625-6); worked with Dr. Tracy at University of Illinois on study of paper containers (R. 627); author of many articles on milk products and milk control, of which two are in the record as plaintiff's exhibits 62 and 63. Many tests made on various aspects of paper milk containers were described by Dr. Prucha and the results appear in charts in the record (plaintiff's exhibits 46 to 60, R. 1572-88; testimony, R. 632-70, 700-16, 755-70, 788-90, 795, 804-5, 823-36). In visiting the paper mill at which respondent's container is made (R. 628), Dr. Prucha found the paper "practically sterile" and the sanitary methods used satisfactory (R. 630-1). In his experience there was a tendency for glass bottle-filling equipment to have more bacterial contamination than the machine for filling Pure-Pak containers (R. 655). In his opinion the Pure-Pak machine protects the unfilled containers "exceptionally well" (R. 659), the bacterial counts obtained in his tests of Pure-Pak containers are "very low" (R. 660), and the containers are sanitary (R. 661). In his opinion the bacteria that he found in adhesive in the containers (five per container) did not present a health problem (R. 710). In examining a Detroit paper mill, he found coli germs in the calender stacks, and after its treatment there the paper is not sterilized (R. 742-3). In his opinion the sanitary quality of that water was of sanitary significance (R. 743-4).

M. J. Woodman of Evanston, Illinois (testimony, R. 672-688), respondent's witness, is in charge of food and milk supply in the health department of Evanston, Illinois. He described rinse tests made in Evanston on respondent's container (R. 673-4). The Evanston Board of Health does not conduct disintegration tests (R. 682-3). He did not con-

sider it necessary to examine paper mills or fabricating plants (R. 675), and had not been to converting plants (R. 681) and did not know the temperature of the paraffin bath at respondent's Chemung plant (R. 685).

Fred O. Tonney of Chicago (testimony, R. 898-938), respondent's witness, bacteriologist and physician, graduate of University of Chicago; was connected with Chicago Board of Health from 1909 to 1937, when he was "executive officer" (R. 899), an office that was abolished in 1937, and the witness thereafter filed suit against the Board of Health (R. 936); was present at hearings of this case to advise respondent's counsel (R. 1001). He described visits made by him the week before he testified and arranged by respondent's counsel) to respondent's plant, to another plant packaging milk in paper containers, and to another plant packaging milk in glass containers (R. 902-06). He had not ever visited a paper mill making paper for milk containers (R. 921) or a converting plant (R. 922). In his opinion the rinse test was equally applicable to glass and paper containers and inspection of paper mills was an "unnecessary refinement" (R. 913). In his opinion the Pure-Pak container represents a distinct advance in the sanitary sale of milk (R. 910-11).

Howard R. Peterson of Chicago (testimony, R. 942-959, 966-67), respondent's witness, engineer at Standard Oil Company, which makes paraffin wax, graduate of University of Nebraska; did post-graduate work in chemical engineering at University of Chicago (R. 942-3). He described the paraffin used in the Pure-Pak machine for coating paper milk containers (R. 944), and tests made by him on the machine in 1939 as to the paraffin used (R. 944-8). In his opinion paraffin does not oxidize in the operation of the Pure-Pak machine (R. 953).

Paul V. Keyser of New York City (testimony taken by deposition, R. 1334-53), respondent's witness, is chemical engineer at Socony Vacuum Oil Company, Inc., graduate of Massachusetts Institute of Technology. He described the process of manufacturing paraffin, its chemistry, its qualities, its uses in coating paper containers, etc. (R. 1336-45). In his opinion a properly paraffin paper container would be satisfactory from the standpoint of absorption for a period of from one to two weeks (R. 1350-52).

Herbert M. Packer of Philadelphia (testimony taken by deposition R. 1355-76) respondent's witness, is a civil engineer, graduate of University of Pennsylvania, chief of housing and sanitation division of Philadelphia Department of Public Health since 1925 (R. 1355-6). He testified about the use of paper milk containers in Philadelphia (R. 1359-61, 1371-74). From a public health standpoint he preferred paper to glass containers (R. 1361-63). There were no regulations in Philadelphia about paper containers but there were about glass containers and he thought there should be regulations about paper containers (R. 1368-69).

A. E. Carpenter of Philadelphia (testimony taken by deposition, R. 1385-96), respondent's witness, is an employee of Sylvan Seal Milk, Inc., with milk plants in Philadelphia and Baltimore distributing milk in Pure-Pak containers (R. 1386-7). He described the extent of the sales made by his company and identified letters received by the company from public health officers of various cities commending the use of the containers (letters, plaintiff's exhibits 5-11, R. 1471-74). The petitioners objected to the admission of the letters on the ground that they were hearsay (R. 1709).

R. T. Vaughn of Chicago (testimony, R. 1302-06), respondent's witness, attending surgeon at Cook County Hospital, testified that mineral oil and paraffin are derived

from the same source (R. 1302) and that paraffin is used in surgery to fill bone cavities and as dressings for wounds (R. 1303-05).

William D. McNally of Chicago (testimony, R. 1251-1301), respondent's witness, physician and toxicologist, graduate of University of Michigan (A.B.) and University of Chicago (M.D.), toxicologist to coroner of Cook County for seventeen years, author of books and many articles (R. 1251-2). In his opinion there was no public health hazard presented by the lead in the ink "offset" on the inside of a paper milk container (R. 1253-62, 1277-89) or by the paraffin that gets in the milk from the container (R. 1262-66). In his opinion the paraffin on paper milk containers prevents bacteria in the container from getting into the milk, unless there was a break in the paraffin (R. 1267).

Lloyd Arnold of Chicago (testimony when called by respondent, R. 610-12; when called by petitioners, R. 1061-1204), since 1927 professor in charge of department of bacteriology and public health at University of Illinois College of Medicine, graduate of Vanderbilt University (M.D.), attended Universities of London, Oxford, Goettingen, Munich; member of Chicago Board of Health (one of defendants) since December, 1938, and since then has done administrative and consulting work for the Board, for which he receives compensation (R. 1064-5); attended all hearings in this case, including taking of deposition (R. 1106), and consulted with petitioners' counsel (R. 1109); has done research and consulting work on soap for Proctor & Gamble Company (R. 1107), on paper for Kimberly-Clark Corporation since 1928 (R. 1101), on paper containers for Ex-Cell-O Corporation during October to December, 1937 (R. 1096-1101) and for Sealrite Company during June to December, 1938 (R. 1102-03).

In his direct examination (R. 1061-1104) Dr. Arnold set forth what he considered the public health problems in

paper mills (R. 1067-75), in converting plants (R. 1075-80), and in paraffining plants (R. 1080-82); he described tests made by him on the absorption of paper containers (R. 1083-85); he stated his opinion of the accuracy of rinse and disintegration tests of paper milk containers (R. 1087-89), of the public health hazards of paraffin in the milk in paper containers (R. 1090-91), of the relative health problems in the use of paper milk containers and paper caps on glass containers (R. 1092-93), of the relative hazards in the use of paper containers for milk and for ice cream, coffee, butter, etc. (R. 1093-95). He described what caused him to change his opinion of paper milk containers as set forth in his report (plaintiff's exhibit 4) made to Dr. Bundesen of the Chicago Board of Health on December 4, 1937 (R. 1102-04). Throughout his testimony he stated his opinion to be that there were public health hazards in the various materials used in paper containers and in the various processes in the making of the containers.

The lengthy cross-examination of Dr. Arnold covers almost a hundred pages in the record (R. 1106-1201), and he was called as a witness by respondents to identify his report of December 4, 1937 (plaintiff's exhibit 4, R. 610-12). Much of his cross-examination was devoted to this report (R. 1121-22 1128-29, 1137, 1145-64, 1193-96). He testified that he did not know of any disease suspected to be caused by single-service containers (R. 1114), and that an advantage of the single-service container over the glass container was that the former aided the prevention of the spread of communicable diseases since the used container was not handled by milk handlers (R. 1115-6). He considered other witnesses, Drs. Sanborn, Prucha, Tracy, and Vaughn, to be competent in their fields and honest in their research work, but he disagreed with some of Dr. Prucha's interpretations of his experiments (R. 1129-34). He had never visited the Cherry River paper mill or the Gardner-Richardson Company (R. 1144).